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The food pyramid meets the regulatory pyramid

Responsive regulation of food advertising to children

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Abstract

Obesity poses an urgent threat to children's health. The causes of obesity are many and varied, but evidence suggests that the food industry makes a significant contribution. Multinational companies use a range of communication channels and marketing techniques to promote unhealthy foods and beverages to children. This promotion has a small but significant effect on children's food preferences and choices, their consumption patterns and diet-related health. While public health advocates call for statutory regulation of unhealthy food advertising, the food industry has mobilised government support for voluntary action.

In Australia, there is significant debate over the success of two self-regulatory codes that address food advertising to children. In this thesis I evaluate the food industry's initiatives using a new approach. Although I consider evidence of the codes' outcomes, I focus on whether they establish the building blocks of an effective self-regulatory regime. I use regulatory studies and public health law to create a framework for evaluation, drawing particularly on the idea of responsive regulation. I also compare food, tobacco and alcohol advertising regulation to predict whether statutory regulation of food advertising is practical and politically feasible.

I find that food and alcohol advertising codes contain a series of 'escape clauses' that permit companies to continue with most of their marketing practices. As a result, the codes do not significantly reduce children's exposure to food and alcohol advertising, or moderate the persuasive techniques used by marketers. Food industry self-regulation lacks the features of a well-designed voluntary scheme, including clear objectives, independent administration and monitoring, effective enforcement and systematic review. Further, regulatory processes are almost entirely industry based, meaning that the scheme is not accountable to external stakeholders. The difficulty of conducting research in this area underscores this conclusion.

Food and alcohol companies report high levels of compliance with the codes, and an ethical commitment to responsible marketing practices. However, the initiatives do not place demanding requirements on participants; they only codify existing best practice in advertising to children. Further, industry initiatives exclude some of the main food and alcohol advertisers. In comparison to tobacco, food and alcohol products are highly varied, making regulation a more complex exercise. More fundamentally, these industries have an economic interest in advertising unhealthy products to a wide range of age groups. Accordingly, they

are unlikely to accept any tighter restrictions on advertising to children, which might impact on their communication with adult audiences.

One way of strengthening self-regulation is to include external stakeholders in regulatory processes. Public health actors engage with the food and alcohol industry (unlike the tobacco industry), creating the potential for more collaborative arrangements. However, experience with the ‘quasi-regulation’ of alcohol advertising illustrates that public health participation may not create a more transparent and accountable scheme. Also, external participation in industry schemes is highly contentious, and public health actors risk their credibility and reputation in doing so. Accordingly, government action is required to broaden the reach of self-regulation and improve its functioning.

Given the strong case for government action, the question becomes what form it should take. There are significant political barriers to legislation, including the power of the food industry, and neo-liberal ideologies that favour minimal regulation. Accordingly, I consider options outside of ‘command-and-control’ regulation. Through co-regulation, the government could set clear objectives for the codes to achieve, establish an independent body for monitoring and enforcement, and formalise its oversight of the scheme. It must also threaten the industry with more intrusive regulation, should the improved scheme fail to reduce children’s exposure to unhealthy food advertising. This strategy implicitly endorses a responsive regulatory approach that begins with voluntary action by the food industry itself. However, it also recognises the central role of the state in regulation, and describes new ways for governments to protect public health.

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From my parents (a nurse and a doctor) I inherited a love of learning, a fascination with public health and a social conscience. I will always be grateful for this heritage, and for their unconditional love and support, even when my adventures take me far from home. I miss them very much, as well as my brothers Olly and Morgan, their partners Jane and Antoinette, and my niece and nephew Isabelle and Jack.

Declaration of originality

I hereby certify that this thesis is entirely my own work. Where it draws upon the writing of others, I have acknowledged this in the text.

This thesis has not been presented for a degree or a diploma, or for any other purposes at The University of Sydney or at any other university or institution.

Publications arising from this study

The following publications and conference presentations resulted from the research undertaken for this thesis.

1. Peer reviewed journal articles

Belinda Reeve, 'The Regulatory Pyramid Meets the Food Pyramid: Can Regulatory Theory Improve Controls on Television Food Advertising to Australian Children?' (2011) 19(1) *Journal of Law and Medicine* 128

Belinda Reeve, 'Private Governance, Public Purpose? Assessing Transparency and Accountability in Self-Regulation of Food Advertising to Children' (2013) 10(2) *Journal of Bioethical Inquiry* 149

Roger S Magnusson and Belinda H Reeve, 'Regulation and the Prevention Agenda' (2013) 199(2) *Medical Journal of Australia* 89

2. Conference presentations

Belinda Reeve, 'Self-Regulation of Food and Alcohol Advertising in Australia: Can Companies Take Responsibility for Public Health?' (Paper presented at the Australasian Association of Bioethics and Health Law Conference, Auckland, 12-14 July 2012)

Belinda Reeve, 'Can Responsive Regulation Reduce Unhealthy Food Advertising to Children?' (Paper presented at the Sydney Health Policy Network Forum, Strengthening Prevention Policy, Sydney Health Policy Network and Prevention Research Collaboration, The University of Sydney, 9 March 2012)

Belinda Reeve, 'Promoting Compliance: Can Advertising Self-Regulation Reduce Unhealthy Food Advertising to Children?' (Paper presented at the Emerging Health Policy Research Conference, Menzies Centre for Health Policy, The University of Sydney, 17 August 2011)

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List of abbreviations and acronyms

AANA	Australian Association of National Advertisers
AARB	Alcohol Advertising Review Board
AAPS	Alcohol Advertising Pre-Vetting Service
ABAC	<i>Alcohol Beverages Advertising (and Packaging) Code</i>
ACMA	Australian Communications and Media Authority
AFGC	Australian Food and Grocery Council
ANPHA	Australian National Preventive Health Agency
ASA	Advertising Standards Authority
BCAP Code	<i>The UK Code of Broadcast Advertising</i>
CAD	Commercials Advice Division
CAP	Committee of Advertising Practice
CAP Code	<i>The UK Code of Non-Broadcast Advertising, Sales Promotion and Direct Marketing</i>
CFAC	Coalition on Food Advertising to Children
CFBAI	<i>US Children's Food and Beverage Advertising Initiative</i>
CSIRO	Commonwealth Scientific and Industrial Research Organisation
CSR	Corporate social responsibility
CTS	<i>Children's Television Standards</i>
FSA	Food Standards Authority
FSANZ	Food Standards Australia New Zealand
Free TV Code	<i>2010 Commercial Television Industry Code of Practice</i>

HKA	Healthy Kids Association
IFBA	<i>International Food and Beverage Alliance</i>
WHO	World Health Organisation
BMI	Body mass index
NGO	Non-government organisation
OfCom	UK Office of Communications
OMA	Outdoor Media Association
RCMI	<i>The Responsible Children's Marketing Initiative of the Australian Food and Beverage Industry</i>
QSR	Quick service restaurant
QSRI	<i>Australian Quick Service Restaurant Industry Initiative for Responsible Advertising and Marketing to Children</i>
UK	United Kingdom
US	United States

INTRODUCTION

1. Obesity, food advertising, and regulatory approaches

Obesity is increasing globally at an alarming rate.¹ Since the 1970s, obesity rates have escalated rapidly in developed and developing countries, and among both adults and children.² In Australia, a quarter of children are obese or overweight, representing a 50 per cent increase from 25 years ago.³ Increases in childhood obesity may have slowed or stabilised, but the prevalence in Australia remains high.⁴ Obesity increases children's risk of elevated blood pressure, insulin resistance, and orthopaedic difficulties, as well as the likelihood of psychosocial problems such as low self-esteem, discrimination and bullying.⁵ Its broader significance lies in the fact that it is linked to obesity and overweight in adults, and associated chronic diseases such as diabetes, hypertension and ischaemic heart disease.⁶ Thus, obesity affects children's immediate quality of life, as well as their future wellbeing and participation in relationships, the workforce, cultural life and physical activity.⁷ Further, childhood obesity has the potential to create a substantial burden on the Australian health care system, both now and in the future.⁸

¹ Obesity and overweight are defined as 'abnormal or excessive fat accumulation that may impair health'. Body Mass Index (BMI) is a simple weight-to-height ratio that is often used to classify obesity and overweight. The World Health Organisation (WHO) defines overweight as a BMI greater than or equal to 25, and obesity as a BMI greater than or equal to 30. World Health Organisation, *Obesity and Overweight* (March 2013) <<http://www.who.int/mediacentre/factsheets/fs311/en/>>. However, cut-off points for obesity and overweight in children vary according to sex and age, as well as height and weight. There is also debate over whether the classifications above are suitable for all ethnicities and age groups. See Australian Institute of Health and Welfare, 'Australia's Health 2012'. Australia's Health Series No 13. Cat No AUS 156 (AIHW, 2012) 208 <<http://www.aihw.gov.au/publication-detail/?id=10737422172>>.

² Mercedes de Onis, Monika Blossner and Elaine Borghi, 'Global Prevalence and Trends of Overweight and Obesity among Preschool Children' (2010) 92(5) *The American Journal of Clinical Nutrition* 1257.

³ LL Hardy et al, *NSW Schools Physical Activity and Nutrition Survey (SPANS) 2010: Short Report* (2010) 4-6 NSW Ministry of Health <http://www0.health.nsw.gov.au/pubs/2011/spans_short.html>; Timothy P Gill et al, 'Childhood Obesity in Australia Remains a Widespread Health Concern that Warrants Population-Wide Prevention Programs' (2009) 190(3) *Medical Journal of Australia* 146.

⁴ Gill et al, above n 3.

⁵ William H Dietz, 'Health Consequences of Obesity in Youth: Childhood Predictors of Adult Disease' (1998) 101(3) *Paediatrics* 518.

⁶ Shumei S Guo et al, 'The Predictive Value of Childhood Body Mass Index Values for Overweight at age 35y' (1994) 59(4) *The American Journal of Clinical Nutrition* 810; I Caterson, 'What Should We Do About Overweight and Obesity?' (1999) 171(11-12) *Medical Journal of Australia* 599; World Health Organisation, 'Obesity: Preventing and Managing the Global Epidemic. Report of a WHO Consultation'. WHO Technical Report Series 894 (World Health Organisation, 2000) pt 2 <http://www.who.int/nutrition/publications/obesity/WHO_TRS_894/en/>; A Magarey et al, 'Predicting Obesity in Early Adulthood from Childhood and Parental Obesity' (2002) 27(4) *International Journal of Obesity* 505.

⁷ C Power, JK Lake, and TJ Cole, 'Measurement and Long-Term Health Risks of Child and Adolescent Fatness' (1997) 21(7) *International Journal of Obesity* 507.

⁸ World Health Organisation, 'Obesity: Preventing and Managing the Global Epidemic', above n 6, 83-86; Magarey et al, above n 6.

Obesity is caused by a complex interplay of factors. These include individual genetic traits and biological mechanisms, eating and physical activity patterns, peer and family influences, and the broader social, economic and cultural forces that shape access to income, housing and education.⁹ However, evidence suggests that changes in the food supply make a significant contribution.¹⁰ Transnational food and drink companies drive unhealthy dietary habits that are linked to obesity and related diseases.¹¹ Collectively called ‘Big Food’, these companies are responsible for the creation and distribution of highly palatable processed foods and sugary beverages that are cheap, readily available, and sold in increasingly large portion sizes.¹² Big Food also aggressively markets these products to young people.¹³ Food companies develop sophisticated marketing strategies that are highly appealing to children, and draw upon a broad range of communication channels and marketing techniques.¹⁴ A growing body of research demonstrates that food marketing influences children’s food preferences and purchase requests, their actual consumption choices and hence their diet-related health.¹⁵

⁹ Gary Egger and Boyd Swinburn, 'An "Ecological Approach" to the Obesity Pandemic' (1997) 315(7106) *British Medical Journal* 477; Sara Gable and Susan Lutz 'Household, Parent and Child Contributions to Childhood Obesity' (2000) 49(3) *Family Relations* 293; Jennifer A O’Dea, 'Gender, Ethnicity, Culture and Social Class Influences on Childhood Obesity Among Australian Schoolchildren: Implications for Treatment, Prevention and Community Education' (2008) 16(3) *Health and Social Care in the Community* 282.

¹⁰ Boyd A Swinburn et al, 'The Global Obesity Pandemic: Shaped by Global Drivers and Local Environments' (2011) 378(9793) *The Lancet* 804. David Stuckler et al, 'Manufacturing Epidemics: The Role of Global Producers in Increased Consumption of Unhealthy Commodities Including Processed Foods, Alcohol and Tobacco' (2012) 9(6) *PLoS Medicine* 1

<<http://www.plosmedicine.org/article/info%3Adoi%2F10.1371%2Fjournal.pmed.1001235>>; Rob Moodie et al, 'Profits and Pandemics: Prevention of Harmful Effects of Tobacco, Alcohol and Ultra-Processed Food and Drink Industries' (2013)(9867) 381 *The Lancet* 670.

¹¹ Stuckler et al, above n 10; Moodie et al, above n 10; Vasanti S Malik, Mattias B Schulze and Frank B Hu, 'Intake of Sugar-Sweetened Beverages and Weight Gain: A Systematic Review' (2006) 84(2) *American Journal of Clinical Nutrition* 274; Carlos Augusto Monteiro et al, 'Increasing Consumption of Ultra-Processed Foods and Likely Impact on Human Health: Evidence from Brazil' (2011) 14(1) *Public Health Nutrition* 5; Sanjay Basu et al, 'Nutritional Determinants of Worldwide Diabetes: An Econometric Study of Food Markets and Diabetes Prevalence in 173 Countries' (2013) 16(1) *Public Health Nutrition* 179.

¹² Swinburn et al, above n 10; 807; Stuckler et al, above n 10; Lisa R Young, and Marion Nestle, 'The Contribution of Expanding Portion Sizes to the US Obesity Epidemic' (2002) 92(2) *American Journal of Public Health* 246; David Stuckler and Marion Nestle, 'Big Food, Food Systems and Global Health' (2012) 9(6) *PLoS Medicine* 1 <<http://www.plosmedicine.org/article/info%3Adoi%2F10.1371%2Fjournal.pmed.1001242>>.

¹³ Marion Nestle, *Food Politics: How the Food Industry Influences Nutrition and Health* (University of California Press, 2002); Michael J McGinnis, Jennifer Gootman and Vivica I Kraak (eds), *Food Marketing to Children and Youth: Threat or Opportunity?* (National Academies Press, 2006).

¹⁴ See, e.g., Susan Linn and Courtney L Novosat, 'Calories for Sale: Food Marketing to Children in the Twenty-First Century' (2008) 615 *The ANNALS of the American Academy of Political and Social Science* 133; Lana Hebdon, Lesley King and Bridget Kelly, Bridget, 'Art of Persuasion: An Analysis of Techniques Used to Market Foods to Children' (2011) 47(11) *Journal of Paediatrics and Child Health* 776.

¹⁵ McGinnis, Gootman and Kraak, above n 13; Gerard Hastings et al, 'Review of the Research on the Effects of Food Promotion to Children' (Centre for Social Marketing, the University of Strathclyde, 22 September 2003) <<http://www.food.gov.uk/multimedia/pdfs/foodpromotiontochildren1.pdf>>; Gerard Hastings et al, 'The Extent, Nature and Effects of Food Promotion to Children: A Review of the Evidence' (World Health Organisation, 2006) <<http://apps.who.int/iris/handle/10665/43627>>; Georgina Cairns, Kathryn Angus and Gerard Hastings, 'The Extent, Nature and Effects of Food Promotion to Children: A Review of the Evidence to December 2008' (World Health Organisation, 2009)14

These effects are significant, operate independently of other factors, and affect both brand and product choices.¹⁶

This evidence has generated significant debate on the issue of food advertising and how it should be regulated. The food industry actively pursues voluntary initiatives, including national and international ‘pledges’ on food advertising to children.¹⁷ In contrast to tobacco advertising, most governments encourage voluntary industry action on food advertising, with only a handful introducing statutory restrictions.¹⁸ However, public health actors argue that legislative approaches are cost-effective and have wide community support, whereas self-regulation produces only small or incremental changes.¹⁹ More fundamentally, the industry’s profit imperative conflicts with public health goals, limiting the benefit of collaborative approaches between government, public health actors and the food industry.²⁰ However, government attempts to legislate have met with significant resistance from the food and beverage industries.²¹ Accordingly, the key question for this thesis is how to effectively regulate food advertising to children in light of governments’ reliance upon industry self-regulation, and the political constraints on statutory regulation.

<http://www.who.int/dietphysicalactivity/publications/marketing_evidence_2009/en/index.html>. See also Simone Pettigrew et al, 'The Effects of Television and Internet Food Advertising on Parents and Children' (2013) (*FirstView Article*) *Public Health Nutrition* 1

<<http://journals.cambridge.org/download.php?file=%2FPHN%2FS1368980013001067a.pdf&code=59bd56f47e02cf49b1a15cd526574854>>.

¹⁶ Cairns, Angus and Hastings, above n 15, 32.

¹⁷ Lisa Sharma, Stephen Teret and Kelly Brownell, 'The Food Industry and Self-Regulation: Standards to Promote Success and to Avoid Public Health Failures' (2010) 100(2) *American Journal of Public Health* 240; Corinna Hawkes and Jennifer Harris, 'An Analysis of the Content of Food Industry Pledges on Marketing to Children' (2011) 14(8) *Public Health Nutrition* 1403.

¹⁸ Corinna Hawkes 'Marketing Food to Children: Changes in the Global Regulatory Environment 2004-2006' (World Health Organisation, 2007); C Hawkes and T Lobstein, 'Regulating the Commercial Promotion of Food to Children: A Survey of Actions Worldwide' (2011) 6(2) *International Journal of Paediatric Obesity* 83.

¹⁹ See, e.g., Moodie et al, above n 10; A Magnus et al, 'The Cost-Effectiveness of Removing Television Advertising of High-Fat and/or High-Sugar Food and Beverages to Australian Children' (2009) 33(10) *International Journal of Obesity* 1094; S MacKay et al, 'A Comprehensive Approach to Protecting Children from Unhealthy Food Advertising' (Obesity Policy Coalition, 2011) 3 <<http://www.opc.org.au/whatwedo/policydocuments.aspx>>.

²⁰ Moodie et al, above n 10; David S Ludwig and Marion Nestle, 'Can the Food Industry Play a Constructive Role in the Obesity Epidemic?' (2008) 300(15) *Journal of the American Medical Association* 1808; Kelly Brownell, 'Thinking Forward: The Quicksand of Appeasing the Food Industry' (2012) 9(7) *PLoS Medicine* 1 <<http://www.plosmedicine.org/article/info%3Adoi%2F10.1371%2Fjournal.pmed.1001254>>.

²¹ See, e.g., Kelly D Brownell and Kenneth E Warner, 'The Perils of Ignoring History: Big Tobacco Played Dirty and Millions Died. How Similar is Big Food?' (2009) 87(1) *The Milbank Quarterly* 259; Michelle M Mello, 'Federal Trade Commission Regulation of Food Advertising to Children: Possibilities for a Reinvigorated Role' (2010) 35(2) *Journal of Health Politics, Policy and Law* 227; Michele Simon 'PepsiCo and Public Health: Is the Nation's Largest Food Company a Model of Corporate Responsibility or Master of Public Relations?' (2011) 15 *CUNY Law Review* 101.

2. Food industry self-regulation in Australia

I use Australia as a case study of voluntary industry standards for food advertising created by transnational companies with significant reach and influence. Similar to governments in other countries, the Australian Federal government has encouraged the food industry to take voluntary action on food advertising to children.²² In 2009, the industry created two voluntary industry codes of conduct: *The Responsible Children's Marketing Initiative of the Australian Food and Beverage Industry* ('Responsible Children's Marketing Initiative' or RCMI)²³ and the Australian Quick Service Restaurant Industry's *Initiative for Responsible Advertising and Marketing to Children* (QSRI).²⁴ These codes are the main subject of this thesis.

The RCMI and QSRI closely resemble food industry pledges in other jurisdictions: companies that join the schemes agree to advertise only healthier products to children, and to restrict their use of persuasive advertising techniques.²⁵ Participants translate the core code document into a 'company action plan' that describes the steps they will take to comply with the code's requirements.²⁶ The Australian Food and Grocery Council (AFGC) (an industry representative body) administers both schemes. The codes also operate within a broader self- and co-regulatory framework for advertising in Australia. As a result, government and advertising industry bodies also play a role in the scheme's regulatory processes. However, this thesis explores whether there is sufficient government intervention in food industry self-regulation to ensure that it serves public health objectives.

An important influence on the development of the codes was the report of the National Preventative Health Taskforce.²⁷ The government created the Taskforce in 2008 to develop a strategy for reducing Australia's burden of chronic disease. The Taskforce's 2009 report

²² See Australian Communications and Media Authority, 'Review of the Children's Television Standards 2005: Report of the Review' (Australian Government, 2008) 10 <http://www.acma.gov.au/WEB/STANDARD/pc=PC_310262>; House of Representatives Standing Committee on Health and Ageing, Parliament of Australia *Weighing It Up: Obesity in Australia* (2009) 9 <http://www.aph.gov.au/parliamentary_business/committees/house_of_representatives_committees?url=haa/.o/obesity/report.htm>.

²³ Australian Food and Grocery Council, *The Responsible Children's Marketing Initiative of the Australian Food and Beverage Industry* (March 2011) <<http://www.afgc.org.au/industry-codes/advertising-kids.html>>.

²⁴ Australian Quick Service Restaurant Industry, *Initiative for Responsible Advertising and Marketing to Children* (June 2009) <<http://www.aana.com.au/QuickServiceRestaurantInitiative.htm>>.

²⁵ See Hawkes and Harris, above n 17.

²⁶ See Australian Food and Grocery Council, *Responsible Children's Marketing Initiative*, above n 23, 1; Australian Quick Service Restaurant Industry, above n 24, 2.

²⁷ See National Preventative Health Taskforce, 'Australia: The Healthiest Country by 2020 - National Preventative Health Strategy - Overview' (Commonwealth of Australia, 2009) <<http://www.preventativehealth.org.au/internet/preventativehealth/publishing.nsf/Content/national-preventative-health-strategy-11p>>.

focused on tobacco use, excessive alcohol consumption, and overweight and obesity.²⁸ The Taskforce devised a 'responsive' approach to reducing children's exposure to unhealthy food advertising.²⁹ As a first step, the government would monitor and evaluate the impact of the food industry's initiatives on children's exposure to this advertising. It would then identify shortfalls in the current approach, and introduce a co-regulatory agreement to address these weaknesses. After further monitoring, the government would introduce legislation if co-regulation failed to reduce unhealthy food advertising shown on television before 9pm, as well as the industry's use of persuasive techniques that targeted children.³⁰ In 2010 the Federal government responded to the Preventative Health Taskforce's report.³¹ The response was equivocal about the Taskforce's recommendations for reducing children's exposure to unhealthy food marketing. While the government agreed to monitor the two food industry initiatives, it did not explicitly commit to statutory regulation if self-regulation proved to be ineffective.³²

3. Is there evidence of self-regulation's success?

Since the Taskforce's 2009 report, a number of studies have evaluated the Australian food industry initiatives. These studies can be divided into three categories: those conducted by the food industry; independent public health research; and reviews of the evidence by government agencies. Industry monitoring of the initiatives reports a dramatic reduction in advertising during designated children's programming.³³ However public health research shows that the initiatives have not significantly reduced children's exposure to unhealthy food advertising.³⁴ These latter studies also point out critical limitations in the content of the

²⁸ Ibid 7.

²⁹ Ibid 12.

³⁰ National Preventative Health Taskforce, 'National Preventative Health Strategy - The Roadmap for Action' (Commonwealth of Australia 2009) 125
<<http://www.preventativehealth.org.au/internet/preventativehealth/publishing.nsf/Content/national-preventative-health-strategy-11p>>.

³¹ Australian Government, 'Taking Preventative Action: A Response to Australia: The Healthiest Country by 2020, The Report of the National Preventative Health Taskforce' (Commonwealth of Australia, 2010)
<<http://www.preventativehealth.org.au/>>.

³² Ibid 46-47.

³³ See Australian Food and Grocery Council, *Food and Beverage Advertising to Children: Activity Report* (December 2010) <<http://www.afgc.org.au/industry-codes/advertising-kids/rcmi-reports-2009.html>>; Australian Food and Grocery Council, *Food and Beverage Advertising to Children: Activity Report* (May 2012) <<http://www.afgc.org.au/industry-codes/advertising-to-children/rcmi/rcmi-reports-2009.html>>; Australian Food and Grocery Council, *Food Adverts for Children Fall to Almost Zero* (8 May 2012) <<http://www.afgc.org.au/media-releases/1196-food-adverts-for-children-fall-to-almost-zero.html>>.

³⁴ Lesley King et al, 'Industry Self-Regulation of Television Food Advertising: Responsible or Responsive?' (2011) 6(2 pt 2) *International Journal of Paediatric Obesity* e390
<<http://onlinelibrary.wiley.com/doi/10.3109/17477166.2010.517313/full>>; Lana Hebden et al, 'Advertising of

codes and their regulatory design. For example, the initiatives do not apply to all communication channels or promotional techniques, and cover only a narrow range of food and beverage products.³⁵ Government reviews find that while food advertising during children's programming is low, children continue to be exposed to unhealthy food advertising during programs not specifically targeted at children.³⁶ Further, there is insufficient evidence to establish that the codes have reduced the amount of food advertising viewed by children.³⁷

Evidently, self-regulation does not sufficiently moderate the volume and persuasive power of food advertising, and this lack of success could justify introduction of legislation on the basis of market failure.³⁸ However, this thesis develops the argument that statutory regulation is unlikely to eventuate in the immediate future. Evidence for this argument comes from the slow and incremental development of tobacco and alcohol advertising regulation, despite significant concern about the harms of both products.³⁹ Also, the food industry has a strong position in the economy⁴⁰ and plays an influential role in food and nutrition policy.⁴¹ Thus,

Fast-Food to Children on Australian Television: The Impact of Industry Self-Regulation' (2011) 195(1) *Medical Journal of Australia* 20; Lesley King et al, 'Building the Case for Independent Monitoring of Food Advertising on Australian Television' (2012) (*FirstView Article*) *Public Health Nutrition* 1 <<http://journals.cambridge.org/action/displayAbstract?fromPage=online&aid=8706977>>.

³⁵ See, e.g., King et al, 'Building the Case for Independent Monitoring of Food Advertising on Australian Television', above n 34; Lana Hebdon et al, 'Regulating the Types of Foods and Beverages Marketed to Australian Children: How Useful are Food Industry Commitments?' (2010) 67(4) *Nutrition & Dietetics* 258; Lana Hebdon et al, 'Industry Self-Regulation of Food Marketing to Children: Reading the Fine Print' (2010) 21(3) *Health Promotion Journal of Australia* 229; J Lumley, J Martin and N Antonopoulos, 'Exposing the Charade: The Failure to Protect Children from Unhealthy Food Advertising' (Obesity Policy Coalition, 2012) <<http://www.opc.org.au/paper.aspx?ID=exposing-the-charade&Type=policydocuments>>; L Wallard et al, 'The Takeaway on Fast-Food Meals: A Summary of Three Fast-Food Studies in Australia' (Cancer Council NSW, 2012) <<http://www.cancercouncil.com.au/68145/news-media/latest-news-news-media/cc-news/fast-food-exposing-the-truth/?pp=68145>>; Belinda Reeve, 'Private Governance, Public Purpose? Assessing Transparency and Accountability in Self-Regulation of Food Advertising to Children' (2013) 10(2) *Journal of Bioethical Inquiry* 149.

³⁶ Lisa G Smithers, John W Lynch and Tracy Merlin, 'Television Marketing of Unhealthy Food and Beverages to Children in Australia: A Review of Published Evidence from 2009' (Australian National Preventive Health Agency, 2012) 3 <<http://www.anpha.gov.au/internet/anpha/publishing.nsf/Content/publications>>.

³⁷ Ibid 2. See also Australian Communications and Media Authority, 'Industry Self-Regulation of Children's Food and Beverage Advertising: ACMA Monitoring Report' (Australian Government, 2011) 6 <<http://engage.acma.gov.au/kids-food-ads/>>.

³⁸ See, e.g., Moodie et al, above n 10; Stuckler and Nestle, above n 12; Ludwig and Nestle, above n 20; Vivica I Kraak, et al, 'Industry Progress to Market a Healthful Diet to American Children and Adolescents' (2011) 41(3) *American Journal of Preventive Medicine* 322.

³⁹ See, e.g., Donley T Studlar, 'The Political Dynamics of Tobacco Control in Australia and New Zealand: Explaining Policy Problems, Instruments and Patterns of Adoption' (2005) 40(2) *Australian Journal of Political Science* 255.

⁴⁰ Australian Food and Grocery Council, *State of the Industry 2012. Essential Information: Facts and Figures* (2012) <<http://www.afgc.org.au/media-releases/1295-state-of-the-industry-2012-report-underlines-challenging-conditions.html>>.

⁴¹ For example, the food industry participates in the government-led Food and Health Dialogue, which focuses on a program of voluntary product reformulation. Department of Health and Ageing, *Industry Engagement* (13 October 2011) Australian Government <<http://www.foodhealthdialogue.gov.au/internet/foodandhealth/publishing.nsf/Content/industry-engagement>>.

the Federal government can often be reluctant to introduce legislation that is unpopular with the industry and which risks disrupting the cooperative relationship between the two actors.⁴² In these circumstances, policy-makers need practical suggestions for improving and building on the current regime, at least as an interim measure. Accordingly, the main task of the thesis is to evaluate food industry self-regulation, and to propose politically feasible ways of strengthening food advertising regulation in order to achieve public health objectives.

4. A responsive approach to food advertising regulation

To assess food industry self-regulation, I adopt the responsive strategy proposed by the National Preventative Health Taskforce. I build upon this approach by creating a more detailed picture of what responsive regulation of food advertising might look like in practice. To do so, I draw upon the theory of responsive regulation developed by Australian academics Ian Ayres and John Braithwaite.⁴³ Responsive regulation is a popular theory in regulatory research and practice, particularly in the fields of workplace health and safety, tax systems, competition policy and environmental protection.⁴⁴ More recently it has appeared in food and obesity prevention policy initiatives: hence my interest in applying it to food advertising.⁴⁵

Responsive regulation draws upon a range of regulatory tools and enforcement measures, combined in a staged approach. It emphasises self-regulation as a first response to regulatory problems, but operating within a framework of government direction and oversight.⁴⁶ This includes the possibility of escalation to more intrusive forms of regulation, should self-regulation fail to achieve public policy objectives. Under responsive regulation, statutory

⁴² See also Alexandra Chung et al, 'An Analysis of Potential Barriers and Enablers to Regulating the Television Marketing of Unhealthy Foods to Children at the State Government Level in Australia' (2012) 12(1) *BMC Public Health* 1123.

⁴³ Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Regulation Debate* (Oxford University Press, 1992). See also John Braithwaite, *To Punish or Persuade: Enforcement of Coal Mine Safety* (State University of New York Press, 1985); John Braithwaite, *Restorative Justice and Responsive Regulation* (Oxford University Press, 2002); John Braithwaite, *Regulatory Capitalism: How It Works, Ideas For Making It Work Better* (Edward Elgar, 2008) ch 4; John Braithwaite, 'The Essence of Responsive Regulation' (2011) 44(3) *UBC Law Review* 475.

⁴⁴ Karen Yeung, *Securing Compliance: A Principled Approach* (Hart Publishing, 2004) 161. See, e.g., Neil Gunningham and Richard Johnstone, *Regulating Workplace Safety: Systems and Sanctions* (Oxford University Press, 1999); Lars P Feld and Bruno S Frey, 'Tax Compliance as the Result of a Psychological Tax Contract: The Role of Incentives and Responsive Regulation' (2007) 29(1) *Law & Policy* 102.

⁴⁵ As I discuss above in relation to the National Preventative Health Taskforce's proposal for regulating food advertising. See also the responsive approach of the Independent Panel that undertook Australia's review of food labelling law and policy: Neal Blewett et al, 'Labelling Logic: Review of Food Labelling Law and Policy' (Commonwealth of Australia, 2011) <<http://www.foodlabellingreview.gov.au/internet/foodlabelling/publishing.nsf/content/home>>.

⁴⁶ Ayres and Braithwaite, above n 43, ch 2; Ian Bartle and Peter Vass, 'Self-Regulation within the Regulatory State: Towards a New Regulatory Paradigm?' (2007) 84(5) *Public Administration* 885, 889.

regulation operates as a ‘measure of last resort’. However, the threat of legislation provides a critical incentive for industry to develop and comply with demanding voluntary standards.⁴⁷

The first step in a responsive regulatory strategy is an analysis of self-regulation. My approach to this task involves a new way of evaluating the RCMI and QSRI (together, ‘the codes’). Although I draw on studies that measure the codes’ outcomes, my main focus is whether they establish the building blocks of a successful self-regulatory regime. The factors I focus on are:

- The terms and conditions of the initiatives, including their substantive controls on advertising;
- Regulatory design, including processes of administration, monitoring, enforcement and review;
- The steps taken by companies to implement the codes;
- The institutional determinants of self-regulation; and
- External pressures on industry to take voluntary action to address food advertising to children.

5. Research design

This thesis uses tobacco and alcohol as comparators to food advertising regulation, specifically restrictions that seek to protect young people from exposure to advertising for these products. It can be thought of as a multi-case study of advertising regulation that has public health objectives.⁴⁸ Food, alcohol and tobacco all have special restrictions on their advertising; however, the nature and scope of advertising restrictions differ between the three products. State and federal legislation combine to place a comprehensive ban on tobacco advertising and promotion in Australia.⁴⁹ In contrast, the government does not ban alcohol advertising, although it restricts the placement of advertisements in broadcast media.⁵⁰ Voluntary codes apply to the content of alcohol advertising, the most important of which is the *Alcohol Beverages Advertising (and Packaging) Code (ABAC)*.⁵¹

⁴⁷ Ayres and Braithwaite, above n 43, 38-39.

⁴⁸ Alan Bryman, *Social Research Methods* (Oxford University Press, 4th ed, 2012) 74.

⁴⁹ *Tobacco Advertising Prohibition Act 1992* (Cth). See, e.g., *Public Health (Tobacco) Act 2008* (NSW) and *Public Health (Tobacco) Regulation 2009* (NSW).

⁵⁰ See Free TV, *2010 Commercial Television Industry Code of Practice* (at 11 July 2013) cls 6.7-6.13.

⁵¹ The ABAC Scheme Limited, *The ABAC Scheme: Alcohol Beverages Advertising (and Packaging) Code* (1 March 2012) <<http://www.abac.org.au/publications/thecode/>>.

There are few legislative restrictions on the placement or volume of food advertising.⁵² Like alcohol, the main form of regulation is via industry initiatives (the RCMI and QSRI), which apply to the placement and content of food advertisements directed to children.⁵³ Thus, food, alcohol and tobacco advertising regulation each represent a different degree of government intervention in the advertising regulatory system. However there is more similarity between food and alcohol advertising restrictions than either product with tobacco.⁵⁴

By analysing the determinants of state intervention in tobacco and alcohol advertising, I hope to make some predictions about whether the government is likely to legislate to protect children from exposure to unhealthy food advertising. Accordingly, this thesis explores the rationale for differences in the scope of advertising restrictions for each of the three product categories. The development of food advertising regulation will follow a different path to regulation of tobacco (and alcohol) advertising, due to changes in the social, political and economic climate since the development of tobacco advertising bans.⁵⁵ Nevertheless, I identify some key similarities and differences between tobacco, food and alcohol, which may explain variation in advertising restrictions for each product. The factors I discuss are:

- The nature and health effects of each product;
- Evidence of a relationship between advertising and consumption of the product;
- The social and cultural context of product use;
- The activities of the relevant industries; and
- The relationships between government, public health and industry actors.

The similarities and differences between tobacco, food and alcohol are more complex than they might appear at first glance. Public health advocates point to parallels between the health harms of the three products, as well as a corporate ‘playbook’ of tactics common to Big Food, Big Tobacco and Big Alcohol – particularly the targeting of young consumers in marketing and product development.⁵⁶ Accordingly, they argue that key elements of the tobacco control

⁵² Sondra Davoren and Nicole Antonopoulos, 'Alcohol and Food Regulation in Australia - Legal Issues in Cancer Prevention' (2012) 36(1) *CancerForum* 1, 2.

⁵³ See Australian Food and Grocery Council, *Responsible Children's Marketing Initiative*, above n 23, 1; Australian Quick Service Restaurant Industry, above n 24, 2.

⁵⁴ Davoren and Antonopoulos, above n 52, 2.

⁵⁵ See, e.g., Studlar, above n 39.

⁵⁶ See Brownell and Warner, above n 21; William H Wiist, 'The Corporate Play Book, Health and Democracy: The Snack Food and Beverage Industry's Tactics in Context' in David Stuckler and Karen Siegal (eds), *Sick Societies: Responding to the Global Challenges of Chronic Disease* (Oxford University Press, 2011) 204; Mike Daube, 'Alcohol and Tobacco' (2012) 36(2) *Australian and New Zealand Journal of Public Health* 108; Lois Dorfman et al, 'Soda and Tobacco Industry Corporate Social Responsibility Campaigns: How Do They

model can and should be applied to alcohol and food regulation.⁵⁷ This thesis questions the political feasibility and practicality of applying statutory restrictions to food advertising similar to those that apply to tobacco marketing and promotion, at least in the medium term.

6. Research methods

Most research on the RCMI and QSRI uses television advertising data to document changes in the nature and volume of food advertising.⁵⁸ This thesis uses a contrasting methodology that draws upon social and legal methods. I undertake close analysis of regulatory instruments and advertising complaint determinations, as well as corporate social responsibility documents and other material from the administration of food and alcohol industry codes of conduct. I combine documentary analysis with qualitative semi-structured interviews with key stakeholders involved in food and alcohol industry self-regulation. I interviewed representatives from large food and alcohol companies, trade industry associations, government agencies, and the independent bodies that administer and enforce advertising self-regulation. I also interviewed a group of public health representatives in order to provide a balanced perspective on the operation of self-regulation. This process of data triangulation seeks to broaden the current understanding of how food and alcohol industry self-regulation works in practice, to describe key strengths and limitations in its operation, and to explore industry, government and public health positions on regulation of food advertising to children.

7. Key assumptions and definitions

I base this thesis on some key assumptions and definitions. The first is a distinction between advertising and other forms of marketing and promotion. One definition of advertising is ‘a paid, mediated form of communication from an identifiable source, designed to persuade the

Compare?’ (2012) 9(6) *PLoS Medicine* e1001241

<<http://www.plosmedicine.org/article/info%3Adoi%2F10.1371%2Fjournal.pmed.1001241>>.

⁵⁷ Brownell and Warner, above n 21; Frank J Chaloupka and Patricia A Davidson, *Applying Tobacco Control Lessons to Obesity: Taxes and Other Pricing Strategies to Reduce Consumption* (2010) Tobacco Control Legal Consortium <<http://publichealthlawcenter.org/sites/default/files/resources/tclc-syn-obesity-2010.pdf>>; Robert H Lustig, Laura A Schmidt and Claire D Brindis, ‘Public Health: The Toxic Truth about Sugar’ (2012) 482(7383) *Nature* 27.

⁵⁸ See, e.g., King et al, ‘Industry Self-Regulation of Television Food Advertising: Responsible or Responsive?’ above n 34; Hebden et al, ‘Advertising of Fast-Food to Children on Australian Television: The Impact of Industry Self-Regulation’, above n 34; King et al, ‘Building the Case for Independent Monitoring of Food Advertising on Australian Television’, above n 34.

receiver to take some action, now or in the future'.⁵⁹ From this definition it is possible to view almost all commercial communications as a form of advertising.⁶⁰ However, advertising industry practitioners and academics tend to distinguish between advertising and forms of marketing such as sales promotion, direct marketing and public relations.⁶¹ Many advertising self-regulatory instruments exclude other forms of promotion, most importantly product packaging, labelling and sponsorship.⁶² I challenge the exception made for these communication techniques, particularly in light of the growth in integrated marketing strategies that combine a range of promotional elements.⁶³ However, I focus my research on television advertising, as this is the most heavily regulated medium, as well as the most studied in research on food advertising.⁶⁴ Further, product packaging and labelling are covered by requirements found in the *Australia and New Zealand Food Standards Code*, and state-level food laws.⁶⁵ Although I touch on this body of law,⁶⁶ it is largely separate from the advertising regulatory framework and is not the main focus of my thesis.

Food industry self-regulation applies to advertising that has children as its target audience.⁶⁷ The RCMI and QSRI use two criteria to determine whether an advertisement is 'directed to children'. The first is whether it is placed in media designed specifically for children, as well as media with large child audiences (for example, television shows where children make up 50 per cent of the audience).⁶⁸ The second criterion is whether the creative content of the

⁵⁹ Jef I Richards and Catharine M Curran, 'Oracles on "Advertising": Searching for a Definition' (2002) 31(2) *Journal of Advertising* 63, 75.

⁶⁰ *Ibid* 63.

⁶¹ *Ibid*.

⁶² For example, the ABAC excludes sponsorship arrangements with alcohol manufacturers. The RCMI and QSRI also exclude sponsorship, as well as product packaging and labelling and other forms of marketing such as in-store promotions. I discuss this loophole in the codes' coverage in Chapter 6.

⁶³ See, e.g., Philip J Kitchen et al, 'The Emergence of IMC: A Theoretical Perspective' (2004) 44(1) *Journal of Advertising Research* 19; National Heart Forum, *An Analysis of the Regulatory and Voluntary Landscape Concerning the Marketing and Promotion of Food and Drink to Children* (2011) <<http://www.heartforum.co.uk/our-work/policy/nutrition/marketing-food-and-drink-to-children/>>.

⁶⁴ David Rolph, Matt Vitins and Judith Bannister, *Media Law: Cases, Materials and Commentary* (Oxford University Press, 2010) 70; Kathy Chapman, Bridget P Kelley and Lesley A King, 'Using a Research Framework to Identify Knowledge Gaps in Research on Food Marketing to Children in Australia' (2009) 33(3) *Australian and New Zealand Journal of Public Health* 253.

⁶⁵ See Food Standards Australia New Zealand, *Australia New Zealand Food Standards Code* (at 11 July 2013). See, e.g., *Food Act 2003* (NSW) div 4 and *Food Regulation 2010* (NSW) pt 2B, which outline requirements for the display of nutritional information at point-of-sale in larger fast-food and snack food chain outlets. These provisions are described in Chapter 2.

⁶⁶ There are some overlaps between the two systems, as I describe in Chapter 2.

⁶⁷ This is the case both with the Australian codes, and food industry pledges in other jurisdictions, such as the United States. See Hawkes and Harris, above n 17; Jennifer L Harris et al, 'Redefining "Child-Directed Advertising" to Reduce Unhealthy Television Food Advertising' (2013) 44(4) *American Journal of Preventative Medicine* 358.

⁶⁸ See the RCMI's definition of 'media': Australian Food and Grocery Council, *Responsible Children's Marketing Initiative*, above n 23, 1. The original version of the QSRI contained a different definition of

advertisement is appealing to children, i.e. its story line, and the visuals, language and sound used.⁶⁹ The distinction between child-directed and adult-directed advertising is a key ‘axis’ for regulation of food advertising.⁷⁰ However, there is significant debate on how to define ‘advertising to children’, and particularly whether it should include advertising that is targeted at other groups but to which children are widely exposed.⁷¹ Thus, this thesis analyses whether it is workable to separate out a segment of advertising that appeals specifically to children, and to make it subject to its own set of restrictions.⁷²

I take the position that the goal of regulation of food advertising to children should be to reduce young people’s exposure to unhealthy food promotion. This position is based on research showing that food advertising influences children’s food preferences, purchasing choices and consumption habits via children’s overall exposure to this advertising.⁷³ The World Health Organisation, public health researchers and health advocacy groups have also recognised that food advertising restrictions must seek to reduce children’s exposure to, and the persuasive power of, marketing for foods high in sugar, salt and saturated fat – a much broader objective than the food industry’s goal of reducing unhealthy food marketing that targets children specifically.⁷⁴ Thus, there is broad consensus in the public health community that food advertising regulation must reduce significantly the amount of unhealthy food

‘medium’, meaning that the code applied to all media regardless of its target audience. However, a revised version of the code uses the same definition of media as the RCMI. As a result, the placement of the advertisement in media directed to children is now relevant to deciding whether the code applies to a particular advertisement. See Australian Food and Grocery Council, *AFGC QSRI Initiative for Responsible Advertising and Marketing to Children* (2013) cl 6 <<http://www.afgc.org.au/industry-codes/advertising-to-children/qsri-initiative.html>>.

⁶⁹ See Elizabeth Handsley et al, 'Regulatory Axes on Food Advertising to Children on Television' (2009) 6(1) *Australia and New Zealand Health Policy* 1, 6.

⁷⁰ This term is coined by Handsley and colleagues, above n 69.

⁷¹ See, e.g., Harris et al, above n 67; World Health Organisation, 'Population-Based Prevention Strategies for Childhood Obesity. Report of the WHO Forum and Technical Meeting' (World Health Organisation, 2010) <<http://www.who.int/dietphysicalactivity/childhood/report/en/>>.

⁷² See also Hebden et al, 'Art of Persuasion: An Analysis of Techniques Used to Market Foods to Children', above n 14, 776-772.

⁷³ See McGinnis, Gootman and Kraak, above n 13; Hastings et al, 'Review of the Research on the Effects of Food Promotion to Children', above n 15; Hastings et al, 'The Extent, Nature and Effects of Food Promotion to Children: A Review of the Evidence', above n 15; Cairns, Angus and Hastings, above n 15; Pettigrew et al, above n 15.

⁷⁴ See, e.g., International Association for the Study of Obesity, Consumers International and International Obesity Taskforce, 'Recommendations for an International Code on Marketing of Foods and Non-Alcoholic Beverages to Children' (Consumers International, March 2008) <<http://www.consumersinternational.org/our-work/food/key-projects/junk-food-generation/our-activity>>; Consumers International, 'Manual for Monitoring Food Marketing to Children' (Consumers International, September 2011) <<http://www.consumersinternational.org/media/795222/food-manual-english-web.pdf>>; World Health Organisation, 'A Framework for Implementing the Set of Recommendations on the Marketing of Foods and Non-Alcoholic Beverages to Children' (World Health Organisation, 2012) 10 <http://www.who.int/dietphysicalactivity/framework_marketing_food_to_children/en/>.

advertising that children see – regardless of whether such advertising targets children or adults – if such regulation is to contribute to improvements in the obesogenic environment.⁷⁵

The title of this thesis refers to the food pyramid, one of many attempts to visually represent the types of food that individuals should eat and in what quantities.⁷⁶ While a number of governments (and NGOs) have used the food pyramid as part of their efforts to provide consumers with guidance on nutrition,⁷⁷ the most prominent and controversial version was released by the US Department of Agriculture in 1992, followed by a revised version in 2005 (it recently replaced the pyramid diagram with an image of a plate divided into four basic food groups).⁷⁸ Nutritionist and health activist Marion Nestle argues that food industry lobby groups exerted undue influence over the design of the US food pyramid, with the result that it did not accurately represent a healthy diet.⁷⁹ Researchers also criticise the pyramid as being confusing and difficult for consumers to understand.⁸⁰ The food pyramid illustrates the significant role of the food industry in shaping official nutrition advice, and consequently the industry's influence on consumer consumption choices, an important underlying theme in this thesis.⁸¹

This thesis refers to the food pyramid only in a rhetorical sense, but I engage with the wider debate on nutrition and food categorisation because of the role of nutrition modelling in restrictions on food advertising. Food advertising regulation occurs within a context of significant debate about how to categorise various foods and beverages, the amount of food that consumers should eat from each category, and whether categorisation is a worthwhile

⁷⁵ See, e.g., Eggers and Swinburn, above n 9; Swinburn et al., above n 10; King et al, 'Industry Self-regulation of Television Food Advertising: Responsible or Responsive?' above n 34; King et al, 'Building the Case for Independent Monitoring of Food Advertising on Australian Television', above n 34; C Hawkes, 'Self-Regulation of Food Advertising: What it Can, Could and Cannot Do To Discourage Unhealthy Eating Habits Among Children' (2005) 30(4) *Nutrition Bulletin* 374.

⁷⁶ The food pyramid organises foods according to product category and nutrient content, accompanied by recommendations for the number and size of servings from each category. Typically it comprises a base layer made up of vegetables, fruits, nuts, legumes, wholemeal breads and cereals (the 'eat most' category), a middle layer that includes fish, lean meat, eggs, chicken and dairy products ('eat moderately') and an apex that contains sugars and fats ('eat in small amounts'). See Nutrition Australia, *The Healthy Living Pyramid* (undated) <<http://www.nutritionaustralia.org/national/resource/healthy-living-pyramid>>.

⁷⁷ See, e.g., EUFIC Review, *Food-Based Dietary Guidelines in Europe* (September 2009) European Food Information Council <<http://www.eufic.org/article/en/expid/food-based-dietary-guidelines-in-europe/>>; GP Faulkner et al., 'Serving Size for Consumers: Is It Effective?' (2012) 71(4) *Proceedings of the Nutrition Society* 610.

⁷⁸ William Neuman, 'Nutrition Plate Unveiled, Replacing Food Pyramid', *The New York Times* (online) 2 June 2011 <http://www.nytimes.com/2011/06/03/business/03plate.html?_r=0>.

⁷⁹ See Nestle, *Food Politics*, above n 13; Marion Nestle, 'Food Lobbies, the Food Pyramid and US Nutrition Advice' (1993) 23(3) *International Journal of Health Services* 483.

⁸⁰ Neuman, above n 77.

⁸¹ See also Jane Dixon and Cathy Banwell, 'Re-embedding Trust: Unravelling the Construction of Modern Diets' (2004) 14(2) *Critical Public Health* 117.

exercise at all.⁸² A complicating factor is that the food industry rejects the distinction between ‘good’ and ‘bad’ foods, arguing that all of its products can contribute to a balanced diet.⁸³ Restrictions on food advertising do not necessarily apply to all food and beverage products. Often regulation distinguishes between healthy unprocessed foods and beverages (such as fresh fruit and vegetables), and energy-dense, processed products that are high in salt, fat and/or sugar (as well as sugary beverages such as soft drink).⁸⁴ The latter, which are restricted in advertising to children, are referred to as ‘junk food’, HFSS products (foods high in fat, salt and sugar), EDNP foods (energy-dense, nutrient-poor), non-core or ‘extra’ foods.⁸⁵ Thus, the distinction between healthy and unhealthy foods is another important axis for food regulation and policy.⁸⁶

Many voluntary initiatives (including the RCMI and QSRI) use nutrient profiling models to identify ‘healthier options’ that can be advertised to children.⁸⁷ However, these models differ significantly according to the types of nutrients considered, the reference amount (for example, per 100g or per portion/serving), the mathematical model followed and how the final result is presented.⁸⁸ Accordingly, I explore how nutrient profiling techniques affect the reach and effectiveness of food industry self-regulation in Australia. I use the term ‘unhealthy foods’ (including sugary beverages) to refer to highly processed products that are energy-dense and contain high levels of salt, fat and sugar. This term is simple and is not linked closely with one regulatory scheme.

⁸² See, e.g., Carlos Monteiro, 'The Big Issue is Ultra-Processing' (2010) 1(6) *World Nutrition* 1.

⁸³ Jeffrey P Koplan and Kelly D Brownell, 'Response of the Food and Beverage Industry to the Obesity Threat' (2010) 304(13) *Journal of the American Medical Association* 1487.

⁸⁴ Hawkes and Harris, above n 17, 6-7; Hawkes and Lobstein, above n 18, 92; World Health Organisation, 'Population-Based Prevention Strategies for Childhood Obesity', above n 71, 12-15.

⁸⁵ For use of different terminology, see King et al, 'Industry Self-regulation of Television Food Advertising: Responsible or Responsive?' above n 34; OfCom, *Television Advertising of Food and Drink Products to Children: Final Statement* (22 February 2007) 1

<http://stakeholders.ofcom.org.uk/consultations/foodads_new/statement/>; AM Rangan et al, 'Changes in Core Food Intake among Australian Children Between 1995 and 2007' (2011) 65(11) *European Journal of Clinical Nutrition* 1201; Anna M Rangan et al, 'Changes in "Extra" Food Intake Among Australian Children Between 1995 and 2007' (2011) *Obesity Research and Clinical Practice* e55

<<http://www.sciencedirect.com/science/article/pii/S1871403X10002917>>.

⁸⁶ Handsley et al, 'Regulatory Axes on Food Advertising to Children on Television', above n 69.

⁸⁷ The RCMI permits companies to choose between nutrient profiling models developed by government or non-government organisations, and those that signatories have created themselves. The QSRI requires that participants use one set of criteria contained in an appendix to the code. See Australian Food and Grocery Council, *Responsible Children's Marketing Initiative*, above n 23, 3; Australian Quick Service Restaurant Industry, above n 24, app 1.

⁸⁸ See World Health Organisation, 'Population-Based Prevention Strategies for Childhood Obesity', above n 71, 11-13.

8. The limits of this thesis

This thesis primarily takes a process-based approach to evaluating food industry self-regulation. However, Chapter 4 describes how this form of evaluation risks distracting attention from more substantive issues around promoting unhealthy products to children, as well validating industry arguments about the desirability of self-regulation. Despite these concerns, for practical and political reasons I consider it worthwhile to examine food industry self-regulation against principles for good regulatory design. The initiatives do not contain specific goals, meaning that they are not designed for an evaluation of their outcomes. Accordingly, there is significant debate about what the codes aim to do, what they should aim to do, and how their effects might be measured.

Critiquing the terms and conditions of the codes could lead to improved objectives that clarify the type of monitoring needed to assess them. A process-based analysis can also help to explain why self-regulation is failing. This kind of understanding is necessary before governments can be persuaded that self-regulation is an inadequate vehicle for achieving public objectives. Further, I assume that there are connections between regulatory processes and regulatory outcomes, which are overlooked in current research on food industry self-regulation. Where industry actors control self-regulatory processes, the terms and objectives of voluntary codes are more likely to reflect industry interests and less likely to serve public health goals.⁸⁹ Thus, I apply insights from regulatory theory to challenge the industry's accountability to external stakeholders, and to make it more responsive to the demands of public health advocates, parents and the community.

The growth in food marketing is only the most visible manifestation of deep-seated changes in the food supply system. Over the past three to four decades, the agriculture and food sectors have been transformed by new transport, food and information technologies, trade liberalisation and an increasingly globalised food market, and accompanying developments in agricultural policy.⁹⁰ As described above, these changes gave rise to the powerful transnational food manufacturers and retailers known as Big Food, and the growing

⁸⁹ Kernaghan Webb, 'Understanding the Voluntary Codes Phenomenon' in Kernaghan Webb (ed), *Voluntary Codes: Private Governance, the Public Interest and Innovation* (Carleton Research Unit for Innovation, Science and Environment, Carleton University, 2004) 2, 18.

⁹⁰ See, e.g., Swinburn et al, above n 10; Stuckler et al, above n 10; Anne Sibbel, 'Public Nutrition and the Role of the Food Industry' (2012) 114(6) *British Food Journal* 784; Corinna Hawkes et al, 'Linking Agricultural Policies with Obesity and Noncommunicable Diseases: A New Perspective for a Globalising World' (2012) 37(3) *Food Policy* 343.

manufacture, supply and marketing of unhealthy food and beverages.⁹¹ The transformation of the food supply chain means that restrictions on advertising should form part of broader strategies to address the food industry's role in the causes and control of obesity. Obesity prevention programs require food and agriculture policies that aim to create an equitable, healthy and sustainable food supply.⁹² Such policies include product reformulation, food labelling, and the provision of nutrition information to consumers.⁹³ Other measures might be fiscal policies and incentives that make healthy food more accessible and affordable.⁹⁴ At a more fundamental level, governments should reconsider economic approaches that are based on consumption-driven growth as a way of building and measuring prosperity.⁹⁵ These policy changes are well beyond the scope of this thesis. However, it is important to acknowledge that advertising forms the tip of an iceberg of unhealthy corporate practices, each of which must be addressed if we are to reverse the obesity epidemic.

9. The thesis structure

The first section of the thesis sets out a framework for evaluating food industry self-regulation. The second and third sections apply this framework to the RCMI and QSRI, and consider ways to improve the food industry's scheme that do not necessarily draw upon government regulation. Chapter 1 describes obesity's threat to children's health, the contribution of food marketing to obesity, and government, public health and industry responses to the problem. It also sets out practical and ethical arguments for strengthening food advertising regulation. Chapter 2 describes restrictions on tobacco, food and alcohol advertising in Australia, ordered according to their degree of government intervention in advertising. Chapter 3 draws together literature from public health law and regulatory studies to provide a theoretical framework for evaluating public health governance in practice. Chapter 4 evaluates the current state of evidence on food advertising self-regulation and translates the theoretical framework from Chapter 3 into a set of criteria for evaluating the determinants of successful voluntary schemes. Section 1 concludes with a description of my research methods.

⁹¹ Brownell and Warner, above n 21.

⁹² Hawkes et al, above n 90; Martin Caraher and John Coveney, 'Public Health Nutrition and Food Policy' (2004) 7(5) *Public Health Nutrition* 591.

⁹³ See, e.g., BA Swinburn et al, 'Diet, Nutrition and the Prevention of Excess Weight Gain and Obesity' (2004) 7(1A) *Public Health Nutrition* 123.

⁹⁴ See, e.g., Hawkes et al, above n 90, 350; Mark Lawrence, 'Reflections on Public Health Policy in the Food Regulatory System: Challenges and Opportunities for Nutrition and Food Law Experts to Collaborate' (2009) 14(2) *Deakin Law Review* 398.

⁹⁵ Swinburn et al, above n 10, 811.

Chapter 6 begins the main task of the thesis, which is applying criteria for a successful responsive regulatory scheme to the RCMI and QSRI. It evaluates the terms and conditions of food and alcohol industry advertising codes, with a specific focus on advertising to children. Chapter 7 compares the RCMI and QSRI against criteria for transparent and accountable self-regulatory processes, using the alcohol industry's code (the ABAC) as a point of comparison. Chapter 8 examines whether the institutional determinants for successful self-regulation are present in the case of the food and alcohol industries. This involves consideration of factors such as the level of industry cohesion, the type of product advertised, the institutional structures for administering self-regulation, and industry-level incentives for developing a voluntary scheme. It concludes that voluntary initiatives in the food industry are unlikely to be successful without government intervention, because of a fundamental conflict between the food industry's profit motive and controls on food advertising to children. The last chapter of Section 2 explores individual food and alcohol companies' rationales for joining voluntary advertising codes, the steps they take to implement code requirements and their opinion on self-regulation's successes and failures.

Section 3 considers ways of improving food industry self-regulation. Chapter 10 describes the influence of public health actors on food and alcohol industry self-regulation, and whether there is scope for greater external stakeholder participation in the RCMI and QSRI. This means exploring whether public health actors would be willing to 'co-regulate' with food and alcohol industry actors as part of a largely voluntary scheme. Chapter 11 explores the Federal government's involvement in food and alcohol industry self-regulation, and mechanisms for strengthening government monitoring and oversight. It also draws together the findings of each chapter to present a detailed model of improvements to the RCMI and QSRI, encompassing code content, administration, enforcement and external participation and oversight. As such, it represents a blueprint for incrementally strengthening regulation of food advertising to children, in an environment where, despite the fact that direct statutory regulation remains unlikely, governments nevertheless need to take a leadership role in regulatory development. In making the case for reform, the thesis draws also attention to new, but under-utilised, forms of public health governance and how they can play a role in obesity prevention strategies.

CHAPTER 1

Setting the scene: advertising unhealthy food and childhood obesity

This chapter considers government, public health and industry responses to the link between food advertising and childhood obesity. In the first sections, I describe the threat that obesity poses to child health. Then I discuss the immediate health problems associated with childhood obesity, as well as those that accrue in adulthood. Next, I describe the multiple causes of childhood obesity, with a specific focus on the contribution of unhealthy food marketing. The second section of the chapter explores the actions of public health actors, government and the food industry to reduce unhealthy food advertising to children. It concludes by examining the practical, ethical and political arguments for government intervention in food advertising to children, as well as describing the aim of this thesis.

1. The problem of childhood obesity

Childhood obesity is increasing at an alarming rate, in both developing and developed countries.¹ In 2010, an estimated 43 million children worldwide under the age of five were overweight.² If rates of childhood obesity and overweight continue to increase, this figure could reach 60 million by 2020.³ North America and some European countries have the highest prevalence of obesity and overweight, as well as Australia and New Zealand.⁴ However, many developing countries have experienced a growth in obesity simultaneously with under-nutrition, due to changes in diet, food availability and lifestyle known as the 'nutrition transition'.⁵ The World Health Organisation (WHO) notes that obesity now ranks fifth as a leading global risk for mortality, due to its contribution to the prevalence of non-

¹ World Health Organisation, 'Obesity: Preventing and Managing the Global Epidemic. Report of a WHO Consultation'. WHO Technical Report Series 894 (World Health Organisation, 2000) 16 <http://www.who.int/nutrition/publications/obesity/WHO_TRS_894/en/>.

² Mercedes de Onis, Monika Blossner and Elaine Borghi, 'Global Prevalence and Trends of Overweight and Obesity among Preschool Children' (2010) 92(5) *The American Journal of Clinical Nutrition* 1257.

³ Youfa Wang and Hyunjung Lim, 'The Global Childhood Obesity Epidemic and the Association Between Socio-Economic Status and Childhood Obesity' (2012) 24(3) *International Review of Psychiatry* 176, 181.

⁴ T Lobstein, L Bauer and R Uauy, 'Obesity in Children and Young People: A Crisis in Public Health' (2004) 5(Suppl 1) *Obesity Reviews* 4, 17; Youfa Wang and Tim Lobstein, 'Worldwide Trends in Childhood Overweight and Obesity' (2006) 1(1) *International Journal of Paediatric Obesity* 11.

⁵ Barry M Popkin, 'The Nutrition Transition and Obesity in the Developing World' (2001) 131(3) *Journal of Nutrition* 871S; Benjamin Caballero, 'A Nutrition Paradox - Underweight and Obesity in Developing Countries' (2005) 352(15) *The New England Journal of Medicine* 1514.

communicable disease.⁶ Accordingly, WHO identifies population-based strategies as vital to preventing childhood obesity and addressing the global epidemic of chronic disease.⁷

Approximately 21 to 25 per cent of Australian children are overweight or obese.⁸ In 2011 to 2012, 17.7 per cent of children aged 5 to 17 years were overweight, and 7.6 per cent were obese.⁹ More girls are overweight or obese (27.1 per cent) than boys (23.6 per cent).¹⁰ Childhood obesity has risen rapidly over the past 20 to 25 years,¹¹ although its prevalence may now have stabilised.¹² However, the high prevalence in Australian children remains a serious concern,¹³ as does obesity's socio-economic gradient. In developed countries such as Australia, obesity and overweight are more prevalent among children from lower socio-economic backgrounds, putting these children at greater risk than those in higher socio-economic groups.¹⁴

Obesity poses immediate and long-term health risks to children and adolescents. Obese children are more likely to develop the risk factors for chronic disease and diabetes, such as increased blood pressure and insulin resistance, and to have orthopaedic difficulties, fatty liver disease, type 2 diabetes, sleep apnoea, and psychosocial problems.¹⁵ The latter include

⁶ World Health Organisation, 'Population-Based Prevention Strategies for Childhood Obesity. Report of the WHO Forum and Technical Meeting' (World Health Organisation, 2010) 8
<<http://www.who.int/dietphysicalactivity/childhood/report/en/>>.

⁷ Ibid 11.

⁸ AM Magarey, LA Daniels and TJ Boulton, 'Prevalence of Overweight and Obesity in Australian Children and Adolescents: Reassessment of 1985 and 1995 Data Against New Standard International Definitions' (2001) 174(11) *Medical Journal of Australia* 561; TS Olds et al, 'Trends in the Prevalence of Childhood Overweight and Obesity in Australia between 1985 and 2008' (2009) 34(1) *International Journal of Obesity* 57.

⁹ Australian Bureau of Statistics, *Australian Health Survey: First Results, 2011-12* (cat. no. 4365.0.55.001) (2012) <<http://www.abs.gov.au/ausstats/abs@.nsf/mf/4364.0.55.001>>.

¹⁰ Ibid, although studies usually suggest that rates of obesity are higher amongst boys than girls. See, e.g., Belinda C Morley et al, 'What Factors Are Associated with Excess Body Weight in Australian Secondary School Students?' (2012) 193(3) *Medical Journal of Australia* 189.

¹¹ Timothy P Gill et al, 'Childhood Obesity in Australia Remains a Widespread Health Concern that Warrants Population-Wide Prevention Programs' (2009) 190(3) *Medical Journal of Australia* 146; LL Hardy et al, *NSW Schools Physical Activity and Nutrition Survey (SPANS) 2010: Short Report* (2010) NSW Ministry of Health <http://www0.health.nsw.gov.au/pubs/2011/spans_short.html>.

¹² See Olds et al, above n 8; Australian Bureau of Statistics, above n 9; Hardy et al above n 11, 5; B Rokholm, JL Baker and A Sørensen, 'The Levelling Off of the Obesity Epidemic Since the Year 1999 - A Review of Evidence and Perspectives' (2010) 11(12) *Obesity Reviews* 835, 839.

¹³ Gill et al, above n 11.

¹⁴ Wang and Lim, above n 3; Morley et al, 'What Factors Are Associated with Excess Body Weight in Australian Secondary School Students?', above n 10; Hardy et al, above n 11; Jennifer O'Dea, 'Differences in Overweight and Obesity Among Australian Schoolchildren of Low and Middle/High Socioeconomic Status' (2003) 179(1) *Medical Journal of Australia* 63.

¹⁵ World Health Organisation, 'Obesity: Preventing and Managing the Global Epidemic', above n 1, 58-60; Lobstein, Bauer and Uauy, above n 4, 23-32; William H Dietz, 'Health Consequences of Obesity in Youth: Childhood Predictors of Adult Disease' (1998) 101(3) *Paediatrics* 518; A Magarey et al, 'Predicting Obesity in Early Adulthood from Childhood and Parental Obesity' (2002) 27(4) *International Journal of Obesity* 505; Elizabeth Denney-Wilson et al, 'Body Mass Index, Waist Circumference, and Chronic Disease Risk Factors in

an increased risk of low self-esteem, perceived self-worth and body dissatisfaction, as well as bullying and feelings of sadness and loneliness.¹⁶ The major significance of childhood obesity lies in its relationship to excess bodyweight in adulthood, and related health problems.¹⁷ Cardiovascular risk factors developed in childhood may persist into adulthood,¹⁸ and obese children are more likely to be obese adults.¹⁹ Adult obesity is associated with a range of health risks, including respiratory difficulties, chronic musculoskeletal problems, skin problems and infertility.²⁰ In the longer-term, obesity predisposes individuals to a number of cardiovascular risk factors, including hypertension, raised cholesterol and impaired glucose intolerance.²¹ Thus, obesity greatly increases the risk of cardiovascular problems such as stroke and heart diseases, as well as certain types of cancer, diabetes and gallbladder disease.²² Studies suggest that it is also important as an independent risk factor for cardiovascular-related morbidity and mortality.²³

Obesity generates significant economic costs, both to the healthcare system and to the economy more broadly.²⁴ One 2008 study estimated that the financial cost of obesity in Australia was \$8.283 billion per annum.²⁵ This included lost productivity costs of \$3.6 billion, health system costs of \$2.0 billion, and carer costs of \$1.19 billion.²⁶ The Federal government bore the largest proportion of these costs (34.3 per cent), followed by individuals

Australian Adolescents' (2008) 162(6) *Archives of Paediatrics and Adolescent Medicine* 566; Frank R Sinatra, 'Nonalcoholic Fatty Liver Disease in Paediatric Patients' (2012) 36(Suppl 1) *Journal of Parenteral and Enteral Nutrition* S43.

¹⁶ Simone A French, Mary Story and Cheryl L Perry, 'Self-Esteem and Obesity in Children and Adolescents: A Literature Review' (1995) 3(5) *Obesity Research* 479; Richard S Strauss, 'Childhood Obesity and Self-Esteem' (2000) 105(1) *Paediatrics* e1 <<http://pediatrics.aappublications.org/content/105/1/e15.short>>; Ian Janssen et al, 'Associations Between Overweight and Obesity With Bullying Behaviours in School-Aged Children' (2004) 113(5) *Paediatrics* 1187; Janet Franklin et al, 'Obesity and Risk of Low Self-Esteem: A Statewide Survey of Australian Children' (2006) 118(6) *Paediatrics* 2481.

¹⁷ World Health Organisation, 'Obesity: Preventing and Managing the Global Epidemic', above n 1, 58; Magarey et al, above n 15; Frank M Biro and Michelle Wien, 'Childhood Obesity and Adult Morbidities' (2010) 91(5) *American Journal of Clinical Nutrition* 1499S.

¹⁸ Lobstein, Bauer and Uauy, above n 4, 26-27.

¹⁹ Kenneth F Ferrero, Roland J Thorpe Jr and Jody A Wilkinson, 'The Life Course of Severe Obesity: Does Childhood Overweight Matter?' (2003) 58B(2) *The Journals of Gerontology* S110.

²⁰ World Health Organisation, 'Obesity: Preventing and Managing the Global Epidemic', above n 1, 42.

²¹ *Ibid* 39-54.

²² *Ibid*.

²³ *Ibid* 47.

²⁴ Access Economics, *The Economic Costs of Obesity* (1996)

<http://www.pbworks.com.au/pdf/Economic_Costs_of_Obesity_Exec_Summ.pdf>; Access Economics, *The Growing Cost of Obesity in 2008: Three Years On* (August 2008) Access Economics and Diabetes Australia <<http://www.diabetesaustralia.com.au/en/Resources/Reports/National/The-growing-cost-of-obesity-in-2008-three-years-on/>>; Stephen Colagiuri, et al, 'The Cost of Overweight and Obesity in Australia' (2010) 192(5) *Medical Journal of Australia* 260.

²⁵ Access Economics, *The Growing Cost of Obesity in 2008*, above n 24, 20.

²⁶ *Ibid*.

(29.4 per cent), family and friends (19.2 per cent) and state governments (5.1 per cent).²⁷ Research on the healthcare costs of childhood obesity in the United States estimated that elevated body mass index (BMI) in childhood cost the country \$14.1 billion annually in additional prescription drugs and emergency room and outpatient visits.²⁸ There are likely to be indirect economic and social costs associated with childhood obesity, such as lost educational opportunities through time off school, and lost days of employment for parents caring for children.²⁹ There are also more intangible costs related to the psychosocial effects of obesity and their lasting impact on children's quality of life.³⁰ Further, the high burden of childhood obesity translates into significant future costs to the healthcare system as the current generation of children progress into adulthood.³¹

2. The causes of childhood obesity

Excess body weight is caused by an imbalance between the amount of energy children consume and how much they expend, over a prolonged period.³² This imbalance is caused by a number of interacting factors, including individual genetic traits and biological mechanisms, physical activity, leisure and transport patterns, and dietary habits.³³ However, high-fat, energy-dense diets and sedentary lifestyles are the two characteristics most strongly associated with the creation of the modern obesity epidemic.³⁴ Thus, as well as a decline in physical activity, childhood obesity is strongly linked to changes in dietary patterns that result in excess energy intake.³⁵

²⁷ Ibid.

²⁸ Leonard Trasande and Samprit Chatterjee, 'The Impact of Obesity on Health Service Utilization and Costs in Childhood' (2009) 17(9) *Obesity* 1749.

²⁹ Lobstein, Bauer and Uauy, above n 4, 30.

³⁰ Ibid 30; BA Swinburn et al, 'Diet, Nutrition and the Prevention of Excess Weight Gain and Obesity' (2004) 7(1A) *Public Health Nutrition* 123, 125.

³¹ Lobstein, Bauer and Uauy, above n 4, 4.

³² World Health Organisation, 'Obesity: Preventing and Managing the Global Epidemic', above n 1, 102-104; Australian Institute of Health and Welfare, 'Australia's Food & Nutrition'. Cat No PHE 163 (AIHW, 2012) 186 <<http://www.aihw.gov.au/publication-detail/?id=10737422319>>.

³³ World Health Organisation, 'Obesity: Preventing and Managing the Global Epidemic', above n 1, 133-135; Hardy et al, above n 11, 4; Morley et al, 'What Factors Are Associated with Excess Body Weight in Australian Secondary School Students?' above n 10.

³⁴ World Health Organisation, 'Obesity: Preventing and Managing the Global Epidemic', above n 1, 108.

³⁵ See, e.g., Swinburn et al, 'Diet, Nutrition and the Prevention of Excess Weight Gain and Obesity', above n 30; Michael J McGinnis, Jennifer Appleton Gootman and Vivica I Kraak, *Food Marketing to Children and Youth: Threat or Opportunity?* (The National Academies Press, 2005); Chris E Rissel et al, 'Soft Drink Consumption and Obesity in NSW School Students' (2012) 196(3) *Medical Journal of Australia* 171.

Many Australian children eat too much unhealthy food and drink too much soft drink, while not meeting their recommended daily intake of fruits and vegetables.³⁶ Studies suggest that Australian children's diets improved between 1995 and 2007, with children eating a greater proportion of healthy foods and fewer 'extra' products such as cakes and muffins, fried potatoes and soft drinks.³⁷ Yet, children's intake of sodium, sugar and fat remain too high.³⁸ The 2007 Australian National Children's Nutrition and Physical Activity Survey found that 79 per cent of children aged between two and three years of age consumed more than the recommended amount of sugar, while 84 per cent of children in this age group consumed more than the recommended amount of saturated fat. The equivalent figures for children aged between 14 and 16 years of age was 61 per cent and 78 per cent respectively.³⁹ Changes in children's nutritional intake are accompanied by shifts in when and where they eat food. An increasing number of children engage in food behaviours that adversely impact upon their diet, including skipping breakfast, snacking on energy-dense foods, and eating food prepared outside the home, including unhealthy products from fast-food outlets.⁴⁰

A broad range of factors affect young people's eating habits. These include individual genetic predispositions, biological and developmental characteristics, as well as the social environment, through interactions with peers, friends and family members.⁴¹ Parents and carers provide children with food both inside and outside the home, and determine meal structure and when meals occur. They also shape children's food beliefs, preferences and

³⁶ Hardy et al, above n 11; Australian Institute of Health and Welfare, 'Australia's Food & Nutrition', above n 32, 162-164.

³⁷ AM Rangan et al, 'Changes in Core Food Intake among Australian Children Between 1995 and 2007' (2011) 65(11) *European Journal of Clinical Nutrition* 1201; Anna M Rangan et al, 'Changes in "Extra" Food Intake Among Australian Children Between 1995 and 2007' (2011) 5 *Obesity Research and Clinical Practice* e55 <<http://www.sciencedirect.com/science/article/pii/S1871403X10002917>>.

³⁸ Australian Institute of Health and Welfare, 'Australia's Food & Nutrition', above n 32, 164-177. See also McGinnis, Gootman and Kraak, above n 35, 54-60.

³⁹ Commonwealth Scientific Industrial Research Organisation (CSIRO), Preventative Health National Research Flagship and the University of South Australia, *Children's Nutrition and Physical Activity Survey: Main Findings* (Commonwealth of Australia, 2008) 14-16 <<http://www.health.gov.au/internet/main/publishing.nsf/Content/phd-nutrition-childrens-survey>>, cited in S MacKay et al, 'A Comprehensive Approach to Protecting Children From Unhealthy Food Advertising' (Obesity Policy Coalition, 2011) 9 <<http://www.opc.org.au/whatwedo/policydocuments.aspx>>.

⁴⁰ Hardy et al, above n 11, 10-11; McGinnis, Gootman and Kraak, above n 35, 69-72; Shanthy A Bowman et al, 'Effects of Fast-Food Consumption on Energy Intake and Dietary Quality Among Children in a National Household Survey' (2004) 113(1) *Paediatrics* 112.

⁴¹ McGinnis, Gootman and Kraak, above n 35, 105; Mary Story, Dianne Neumark-Sztainer and Simone French, 'Individual and Environmental Influences on Adolescent Eating Behaviour' (2002) 102(suppl 3) *Journal of the American Dietetic Association* S40; Mary Story et al, 'Creating Healthy Food and Eating Environments: Policy and Environmental Approaches' (2008) 29 *Annual Review of Public Health* 253.

values in a way that determines their lifetime consumption habits.⁴² The settings in which children consume food may also contribute to obesity, for example the provision of unhealthy foods and beverages in school canteens and vending machines.⁴³ At a fundamental level, children's food choices depend on broad social, economic and cultural factors that create an 'obesogenic' environment.⁴⁴ These include modernisation, urbanisation and associated changes in eating habits and transport use,⁴⁵ and a growing number of mothers in the workforce, accompanied by a decline in time spent in food preparation.⁴⁶

Researchers also point to important changes in the global food system, including an industrial approach to agriculture and food production, the creation of a global market for the trade of food products, and the commercialisation of food manufacturing and retail.⁴⁷ Studies chart the emergence of 'Big Food' as a result of these trends. The global food market is dominated by a handful of large multinational agribusinesses, food manufacturers and retailers with highly concentrated market power.⁴⁸ These include companies such as Nestlé, Kraft Foods, Unilever, PepsiCo, General Mills, and McDonald's. In 2011, the top ten packaged food companies accounted for 15.2 per cent of global packaged food sales.⁴⁹ The top ten global soft drink companies accounted for 53.3 per cent of total drink sales, with Coca-Cola, PepsiCo and Nestlé totalling 40 per cent of sales between them.⁵⁰ Big Food engages in a cluster of practices that contribute to poor nutrition and rising rates of obesity. They develop and produce 'ultra-processed' foods high in fat, salt and sugar, increase the size of products or

⁴² McGinnis, Gootman and Kraak, above n 35, 105; Story, Neumark-Sztainer and French, above n 41, S44; Leanne L Birch, 'Development of Food Preferences' (1999) 19(1) *Annual Review of Nutrition* 41.

⁴³ Story, Neumark-Sztainer and French above n 41, 255; AC Bell and BA Swinburn, 'What are the Key Food Groups to Target for Preventing Obesity and Improving Nutrition in Schools?' (2004) 58(2) *European Journal of Clinical Nutrition* 258.

⁴⁴ Story, Neumark-Sztainer and French, above n 41, 255; Gary Egger and Boyd Swinburn, 'An "Ecological Approach" to the Obesity Pandemic' (1997) 315 *British Medical Journal* 477.

⁴⁵ World Health Organisation, 'Obesity: Preventing and Managing the Global Epidemic', above n 1, 118-124.

⁴⁶ Ibid 120-132; Cathy Banwell, Megan Shipley and Lyndall Strazdins, 'The Pressured Parenting Environment. Parents as Piggy in the Middle' in Jane Dixon and Dorothy Broom (eds), *The 7 Deadly Sins of Obesity: How the Modern World is Making Us Fat* (UNSW Press, 2007) 46, 56.

⁴⁷ World Health Organisation, 'Obesity: Preventing and Managing the Global Epidemic', above n 1, 120-132; Boyd A Swinburn et al, 'The Global Obesity Pandemic: Shaped by Global Drivers and Local Environments' (2011) 378(9793) *The Lancet* 804; David Stuckler et al, 'Manufacturing Epidemics: The Role of Global Producers in Increased Consumption of Unhealthy Commodities Including Processed Foods, Alcohol, and Tobacco' (2012) 9(6) *PLoS Medicine* 1

<<http://www.plosmedicine.org/article/info%3Adoi%2F10.1371%2Fjournal.pmed.1001235>>.

⁴⁸ Kelly D Brownell and Kenneth E Warner, 'The Perils of Ignoring History: Big Tobacco Played Dirty and Millions Died. How Similar is Big Food?' (2009) 87(1) *The Milbank Quarterly* 259; David Stuckler and Marion Nestle, 'Big Food, Food Systems and Global Health' (2012) 9(6) *PLoS Medicine* 1

<<http://www.plosmedicine.org/article/info%3Adoi%2F10.1371%2Fjournal.pmed.1001242>>

⁴⁹ Eleanore Alexander, Derek Yack and George A Mensah, 'Major Multinational Food and Beverage Companies and Informal Sector Contributions to Global Food Consumption: Implications for Nutrition Policy' (2011) 7 *Globalisation and Health* 26, 28.

⁵⁰ Ibid.

‘upsized’ fast-food meals, sell unhealthy products at low prices, stall or block effective public health interventions, penetrate emerging markets and aggressively market unhealthy foods and beverages to children.⁵¹ Thus, public health advocates view Big Food as a key vector in the ‘industrial epidemic’ of non-communicable disease.⁵²

3. Food marketing to children

An increasing body of research documents Big Food’s strategy of marketing to children and explores the impact of food advertising on children’s diets. Food companies spend a vast amount of money on advertising to children. In 2009, US companies spent \$1.7 billion on advertising to people between the ages of two and 17.⁵³ Food marketers target children because of their growing role as independent consumers, their influence on families’ food purchasing and because they represent a future adult market.⁵⁴ Food is the third most heavily advertised consumer product and the most prevalent marketing category targeting children and young people.⁵⁵ Food advertising to children in all media is dominated by promotions for the ‘Big Five’: sugar-sweetened breakfast cereals, soft-drinks, confectionery, savoury snacks, and increasingly, promotions for fast-food.⁵⁶ Conversely, there is little to no advertising for

⁵¹ Stuckler et al, above n 47; Brownell and Warner, above n 48; Stuckler and Nestle, above n 48; David Cameron-Smith, Shane A Bilborough and Timothy C Crowe, 'Upsizing Australia's Waistline: The Dangers of "Meal Deals"' (2002) 177(2) *Medical Journal of Australia* 686; Carlos Augusto Monteiro et al, 'A New Classification of Foods Based on the Extent and Purpose of their Processing' (2009) 26(11) *Cadernos de Saúde Pública* 2039; Carlos Monteiro, 'The Big Issue is Ultra-Processing' (2010) 1(6) *World Nutrition* 1; Carlos Augusto Monteiro et al, 'Increasing Consumption of Ultra-Processed Foods and Likely Impact on Human Health: Evidence from Brazil' (2011) 14(1) *Public Health Nutrition* 5; William H Wiist, 'The Corporate Play Book, Health and Democracy: The Snack Food and Beverage industry's Tactics in Context' in David Stuckler and Karen Siegal (eds), *Sick Societies: Responding to the Global Challenges of Chronic Disease* (Oxford University Press, 2011) 204; Rob Moodie et al, 'Profits and Pandemics: Prevention of Harmful Effects of Tobacco, Alcohol and Ultra-Processed Food and Drink Industries' (2013) 381 *The Lancet* 670.

⁵² Rene I Jahiel and Thomas F Barbor, 'Industrial Epidemics, Public Health Advocacy and the Alcohol Industry: Lessons from other Fields' (2007) 102(9) *Addiction* 1335; Anna B Gilmore, Emily Savell and Jeff Collin, 'Public Health, Corporations and the New Responsibility Deal: Promoting Partnerships with Vectors of Disease?' (2011) 33(1) *Journal of Public Health* 2.

⁵³ Jon Leibowitz et al, 'A Review of Food Marketing to Children and Adolescents: Follow-up Report' (Federal Trade Commission, December 2012) 5 <<http://www.ftc.gov/opa/2012/12/foodmarketing.shtm>>.

⁵⁴ McGinnis, Gootman and Kraak, above n 35, 138.

⁵⁵ Georgina Cairns, Kathryn Angus and Gerard Hastings, 'The Extent, Nature and Effects of Food Promotion to Children: A Review of the Evidence to December 2008' (World Health Organisation, 2009) 14 <http://www.who.int/dietphysicalactivity/publications/marketing_evidence_2009/en/>. See also Bridget Kelly et al, 'Trends in Food Advertising to Children on Free-to-Air Television in Australia' (2011) 35(2) *Australian and New Zealand Journal of Public Health* 131; Emma J Boyland and Jason CG Halford, 'Television Advertising and Branding: Effects on Eating Behaviour and Food Preferences in Children' (2012) 62 *Appetite* 236.

⁵⁶ Cairns, Angus and Hastings, above n 55, 14.

unprocessed products such as fruit and vegetables, whole grains and milk.⁵⁷ Thus, the advertised diet contrasts sharply with that recommended by nutritionists.⁵⁸

Communication channels

Television remains the dominant platform for food advertising to children, although research suggests that its importance is diminishing.⁵⁹ However, while rates of televised food advertising may be decreasing, it remains skewed towards unhealthy products.⁶⁰ One study of food advertising on Sydney commercial television channels in 2006 found that there was a higher frequency of unhealthy food advertising during designated children's viewing times (49 per cent of all food advertising during these periods) compared to adult viewing times (39 per cent).⁶¹ There was also a large amount of food advertising during television shows that were popular with children, 65.9 per cent of which was for unhealthy products.⁶² Unhealthy foods and beverages continue to be heavily promoted during designated children's programs, on television channels designed for a youth audience⁶³ and during children's peak viewing times.⁶⁴

Large numbers of children watch television during the early evenings,⁶⁵ meaning that children are exposed to many general audience shows and the advertising that accompanies them.⁶⁶ For example, far greater numbers of children watch programs such as *The Simpsons*, which tend to be shown in the early evening, compared to shows broadcast on Saturday morning, a traditional children's viewing period. Although the latter has a much higher concentration of children in the audience, the former has a larger number of child viewers overall.⁶⁷ Thus,

⁵⁷ Ibid.

⁵⁸ Ibid 15.

⁵⁹ Ibid 12; National Heart Forum, *An Analysis of the Regulatory and Voluntary Landscape Concerning the Marketing and Promotion of Food and Drink to Children* (2011) 35 <<http://www.heartforum.co.uk/our-work/policy/nutrition/marketing-food-and-drink-to-children/>>.

⁶⁰ Kelly et al, 'Trends in Food Advertising to Children on Free-to-Air Television in Australia', above n 55, 134.

⁶¹ Ibid.

⁶² Ibid 1237.

⁶³ McGinnis, Gootman and Kraak, above n 35, 183-184; Cairns, Angus and Hastings, above n 55, 12; Boyland and Halford, above n 55; Michele Roberts and Simone Pettigrew, 'A Thematic Content Analysis of Children's Food Advertising' (2007) 26(3) *International Journal of Advertising* 357.

⁶⁴ McGinnis, Gootman and Kraak, above n 35, 184-185; Kelly et al, 'Trends in Food Advertising to Children on Free-to-Air Television in Australia', above n 55; Kathy Chapman, Penny Nicholas and Rajah Supramaniam, 'How Much Food Advertising is There On Australian Television?' (2006) 21(3) *Health Promotion International* 172.

⁶⁵ McGinnis, Gootman and Kraak, above n 35; 184; Chapman, Nicholas and Supramaniam, above n 64.

⁶⁶ Ibid.

⁶⁷ McGinnis, Gootman and Kraak, above n 35, 184-185. See also J Lumley, J Martin and N Antonopoulos, 'Exposing the Charade: The Failure to Protect Children from Unhealthy Food Advertising' (Obesity Policy

children view a considerable amount of unhealthy food advertising during general audience shows and family viewing times when parents and children watch television together.⁶⁸

Food marketers target children through other traditional media channels, such as popular children's magazines.⁶⁹ One study investigated food promotions in 14 child-targeted magazine titles published in Australia, including *Disney Adventures* and *Bratz*.⁷⁰ It found 269 branded food references in 149 editions of these magazines, the vast majority of which were for unhealthy products (86.2 per cent).⁷¹ However, only 83 of the 269 references were clearly identified as advertisements. The remainder comprised competitions, brand promotions or non-food advertisements and product placement, all of which obscure the differences between commercial and editorial content.⁷²

Unhealthy food advertising is also prevalent on bus shelters and billboards along main roads, shopping areas and train stations and concentrated around primary schools.⁷³ Quick service restaurant companies create 'kids clubs' as a way to communicate and maintain a relationship with children, where members receive personalised marketing material such as membership cards and newsletters.⁷⁴ An emerging area of concern is in-school promotion, through sponsored resources and activities, including school sports events.⁷⁵ Food marketing also occurs through product packaging and labelling and point-of-sale promotions, including in supermarkets and at quick service restaurants.⁷⁶ Thus, although television advertising comprises the largest proportion of measured spend on food advertising, the use of non-

Coalition, 2012) 11-12 <<http://www.opc.org.au/paper.aspx?ID=exposing-the-charade&Type=policydocuments>>.

⁶⁸ Lumley, Martin and Antonopoulos, above n 67, 11-12.

⁶⁹ Bridget Kelly and Kathy Chapman, 'Food References and Marketing to Children in Australian Magazines: A Content Analysis' (2007) 22(4) *Health Promotion International* 284; SC Jones, P Gregory and L Kervin, 'Branded Food References in Children's Magazines: "Advertisements are the Tip of the Iceberg"' (2012) 7(3) *Paediatric Obesity* 220.

⁷⁰ Jones, Gregory and Kervin, above n 69.

⁷¹ Ibid 224.

⁷² Ibid 223-224.

⁷³ Bridget Kelly et al, 'The Commercial Food Landscape: Outdoor Food Advertising around Primary Schools in Australia' (2008) 32(6) *Australian and New Zealand Journal of Public Health* 522.

⁷⁴ Mary Story and Simone French, 'Food Advertising and Marketing Directed at Children and Adolescents in the US' (2004) 1 *International Journal of Behavioural Nutrition and Physical Activity* 3, 6.

⁷⁵ National Heart Forum, above n 59, 40-41; Bridget Kelly et al, 'Food and Drink Sponsorship of Children's Sport in Australia: Who Pays?' (2010) 26(2) *Health Promotion International* 188.

⁷⁶ National Heart Forum, above n 59, 46; Kathy Chapman et al, 'The Extent and Nature of Food Promotion Directed to Children in Australian Supermarkets' (2006) 21(4) *Health Promotion International* 331; Jennifer L Harris, Marlene B Schwartz and Kelly D Brownell, 'Marketing Foods to Children and Adolescents: Licensed Characters and Other Promotions on Packaged Foods in the Supermarket' (2010) 13(3) *Public Health Nutrition* 409; Lana Hebden et al, 'A Menagerie of Promotional Characters: Promoting Food to Children Through Food Packaging' (2011) 43(5) *Journal of Nutrition Education and Behaviour* 349.

broadcast media creates an environment where children are continuously exposed to commercial messages promoting unhealthy food.

Food promotion increasingly draws upon new media extensively used by children and young people.⁷⁷ Big Food uses viral or ‘buzz’ marketing to market its products, as well as advertising via text messages, social networking sites, company-owned websites, marketing on third party internet sites and ‘advergaming’, i.e. embedding references to products or brands in computer games.⁷⁸ One 2009 study of fast-food marketing in the United States identified three child-targeted websites sponsored by McDonald’s, in addition to its main restaurant website.⁷⁹ One site (McWorld.com) provided a highly engaging virtual world for children, complete with games, opportunities to chat with friends and cross-promotions to the ‘Star Wars’ movies.⁸⁰ This site received an average of 128,000 unique visitors each month aged between two and 17 years, i.e. approximately 1.5 million per year.⁸¹

The interactive nature of digital media enables marketers to build relationships with young consumers, particularly given young people’s ‘constant connectivity’.⁸² Companies can also create more personalised and participatory advertising campaigns by using digital marketing ‘to create, test and adjust their marketing messages in real time’.⁸³ New forms of marketing blur the distinction between commercial and editorial content, data collection and analysis, and socialising and entertainment.⁸⁴ By drawing upon multiple media channels that complement and link to each other, marketers create integrated marketing strategies that are far more sophisticated, broad-reaching and influential than traditional advertising

⁷⁷ National Heart Forum, above n 59, 34.

⁷⁸ Leibowitz et al, above n 53, 15-16; National Heart Forum, above n 59, 43; Bridget Kelly et al, 'Internet Food Marketing on Popular Children's Websites and Food Product Websites in Australia' (2008) 11(11) *Public Health Nutrition* 1180; Sandra C Jones and Amanda Reid, 'Marketing to Children and Teens on Australian Food Company Web Sites' (2010) 11(1) *Young Consumers* 57.

⁷⁹ Jennifer L Harris et al, *Fast-Food FACTS: Evaluating Fast-Food Nutrition and Marketing to Youth* (2010) 71 Rudd Centre for Food Policy and Obesity <http://www.fastfoodmarketing.org/media/FastFoodFACTS_Report.pdf>.

⁸⁰ Ibid 71-72.

⁸¹ Ibid 79.

⁸² Kathryn C Montgomery, and Jeff Chester, 'Interactive Food and Beverage Marketing: Targeting Adolescents in the Digital Age' (2009) 45(3) *Journal of Adolescent Health* S18, S20.

⁸³ World Health Organisation, 'Marketing of Foods High in Fat, Salt and Sugar to Children: Update 2012-2013' (World Health Organisation Regional Office for Europe, 2013) 6 <<http://www.euro.who.int/en/what-we-publish/abstracts/marketing-of-foods-high-in-fat,-salt-and-sugar-to-children-update-20122013>>. See also National Heart Forum, above n 59, 42; Montgomery and Chester, above n 82.

⁸⁴ National Heart Forum, above n 59, 37; Montgomery and Chester, above n 82, S22.

campaigns.⁸⁵ As noted by WHO, '[f]ood marketing to children is now a global phenomenon, and tends to be pluralistic and integrated, using multiple messages in multiple channels'.⁸⁶

Persuasive techniques

Food advertising uses creative content that is highly appealing to young viewers, such as themes of fantasy, fun and novelty.⁸⁷ The use of animation is strongly associated with advertising to children, as is the use of humour.⁸⁸ The content of food companies' websites is highly appealing to young people, often including free downloads, advergames and music.⁸⁹ Food marketers use persuasive techniques to which children are particularly susceptible, including competitions, product placement and premium offers.⁹⁰ Techniques such as premium offers (where children receive a toy or gift free upon purchasing a food product) are designed to promote 'pester-power', where children ask their parents to purchase products on their behalf.⁹¹ Food manufacturers and fast-food chains engage in cross-promotions or co-branding that draws upon licensed characters and celebrities from popular children's programs, books or movies.⁹² Companies also create their own proprietary or 'equity-brand' characters that appeal to children and help to build children's recognition and liking of the company's brand and its products,⁹³ for example Ronald McDonald or Coco the Monkey (used to promote the Coco Pops cereal).⁹⁴ One study of packaged foods in Australian supermarkets found that products promoted by company-owned characters were much more likely to have a poor nutrition profile compared to those promoted by sportspersons, celebrities and movie tie-ins.⁹⁵ Given the ubiquity of food advertising, public health

⁸⁵ Cairns, Angus and Hastings, above n 55, 2.

⁸⁶ World Health Organisation, 'Set of Recommendations on the Marketing of Foods and Non-Alcoholic Beverages to Children' (World Health Organisation, 2010) 7
<<http://www.who.int/dietphysicalactivity/marketing-food-to-children/en/>>.

⁸⁷ Cairns, Angus and Hastings, above n 55, 16; Roberts and Pettigrew, above n 63; Lana Hebden, Lesley King and Bridget Kelly, 'Art of Persuasion: An Analysis of Techniques Used to Market Foods to Children' (2011) 47(11) *Journal of Paediatrics and Child Health* 776.

⁸⁸ Cairns, Angus and Hastings, above n 55, 2; Hebden, King and Kelly, above n 87.

⁸⁹ National Heart Forum, above n 59, 43; Story and French, above n 74; Bridget Kelly et al, 'Internet Food Marketing on Popular Children's Websites and Food Product Websites in Australia' (2008) 11(11) *Public Health Nutrition* 1180, 1185.

⁹⁰ National Heart Forum, above n 59, 43; Committee on Communications, 'Children, Adolescents and Advertising' (2006) 118 *Paediatrics* 2563, 2566.

⁹¹ Cairns, Angus and Hastings, above n 55, 17.

⁹² McGinnis, Gootman and Kraak, above n 35, 173; Brian Wilcox et al, 'Report of the APA Taskforce on Advertising and Children' (American Psychological Association, 20 February 2004) 2
<<http://www.apa.org/pubs/info/reports/advertising-children.aspx>>.

⁹³ *Ibid* 170.

⁹⁴ National Heart Forum, above n 59, 43.

⁹⁵ Lana Hebden et al, 'A Menagerie of Promotional Characters: Promoting Food to Children Through Food Packaging', above n 76, 351-352.

organisations raise concerns about both the volume of advertising directed to children and its content, i.e. its persuasive power.⁹⁶

4. The influence of food advertising on children's diets

There is considerable debate about the association between unhealthy food advertising and child obesity. Research is based on psychological theories that assume a sequential path between exposure to marketing and children's behaviour.⁹⁷ Accordingly, researchers try to demonstrate a series of connections between food advertising, children's food beliefs and preferences, their purchase requests, actual consumption choices and diet-related health.⁹⁸ It is difficult to isolate the effects of promotion from other aspects of the marketing process, as well as from other influences on children's diet and nutrition.⁹⁹ Therefore, it is a complex task to establish a causal relationship between advertising and obesity.¹⁰⁰ However, a growing body of evidence supports the chain of steps that lead to advertising having an influence on children's dietary patterns and nutrition-related health. While there is little Australian research on the effects of food marketing,¹⁰¹ there are a number of highly influential international studies.¹⁰² The most important of these are systematic reviews commissioned or undertaken by government agencies, as well as WHO.

The history of research on food advertising's effects on children

In 2003, the UK Food Standards Authority commissioned researchers at the University of Strathclyde (led by Gerard Hastings) to conduct the first systematic study of the effects of food promotion on children.¹⁰³ The review concluded that food promotion affects children's food preferences, purchase behaviour and consumption, independent of other factors. This effect operated at both brand and category level, i.e. the selection of one type of food over

⁹⁶ World Health Organisation, 'Set of Recommendations on the Marketing of Foods and Non-Alcoholic Beverages to Children', above n 86, 8. See also Hebden, King and Kelly, above n 87, 8.

⁹⁷ Jennifer L Harris et al, 'A Crisis in the Marketplace: How Food Marketing Contributes to Childhood Obesity and What Can be Done' (2009) 30 *Annual Review of Public Health* 211, 214.

⁹⁸ *Ibid.*

⁹⁹ Cairns, Angus and Hastings, above n 55, 36.

¹⁰⁰ McGinnis, Gootman and Kraak, above n 35, 31.

¹⁰¹ Kathy Chapman, Bridget Kelly and Lesley King, 'Using a Research Framework to Identify Knowledge Gaps in Research on Food Marketing to Children in Australia' (2009) 33(3) *Australian and New Zealand Journal of Public Health* 253.

¹⁰² See Cairns, Angus and Hastings, above n 55; McGinnis, Gootman and Kraak, above n 35.

¹⁰³ Gerard Hastings et al, 'Review of the Research on the Effects of Food Promotion to Children' (Centre for Social Marketing, the University of Strathclyde, 22 September 2003) <<http://www.food.gov.uk/multimedia/pdfs/foodpromotiontochildren1.pdf>>.

another, rather than choosing between two different brands of the same product.¹⁰⁴ The review generated significant academic debate, as well as rebuttals from the UK advertising industry.¹⁰⁵ In 2004, the UK's Office of Communications (OfCom) commissioned Sonia Livingstone of the London School of Economics to produce a commentary on the Hastings report and on studies commissioned by the UK advertising industry, as well as earlier research from other government agencies.¹⁰⁶ Livingstone's report found that food advertising had modest effects on children's food choices,¹⁰⁷ but its role was limited compared to other factors.¹⁰⁸

In December 2003, the Secretary of State for Culture, Media and Sport asked OfCom to consider proposals for strengthening the rules on television food advertising directed to children.¹⁰⁹ In response, OfCom commissioned a second report from Sonia Livingstone (co-authored by Ellen Helsper) to review evidence on the role of television advertising in influencing children's consumption of unhealthy foods.¹¹⁰ The authors' 2004 report prompted Ofcom's conclusion that food advertising had a modest direct effect on children's food preferences, and larger but unquantifiable indirect effects on their food preferences, consumption and behaviour.¹¹¹ Consequently, OfCom decided that there was 'a case for proportionate and targeted action in terms of rules for broadcast advertising to address the issue of child health and obesity'.¹¹² OfCom commissioned an update of the Livingstone and Helsper review as part of its consultation process on proposed regulatory options for restricting food advertising.¹¹³ The resulting 2006 review reported 'a growing consensus that

¹⁰⁴ Ibid 3.

¹⁰⁵ David Buckingham, 'The Appliance of Science: The Role of Evidence in the Making of Regulatory Policy on Children and Food Advertising in the UK' (2009) 15(2) *International Journal of Cultural Policy* 201, 208.

¹⁰⁶ Sonia Livingstone, 'A Commentary on the Research Evidence Regarding the Effects of Food Promotion on Children' (Department of Media and Communications, London School of Economics and Political Science, February 2004) <<http://eprints.lse.ac.uk/21756/>>.

¹⁰⁷ Ibid 20.

¹⁰⁸ Ibid 23.

¹⁰⁹ OfCom, *Television Advertising of Food and Drink Products to Children: Final Statement* (OfCom, 22 February 2007) 1 <http://stakeholders.ofcom.org.uk/consultations/foodads_new/statement/>.

¹¹⁰ Ibid 2; Sonia Livingstone and Ellen Helsper, 'Advertising Foods to Children: Understanding Promotion in the Context of Children's Daily Lives' (Department of Media and Communications, London School of Economics and Political Science, May 2004) <http://stakeholders.ofcom.org.uk/market-data-research/other/tv-research/food_ads/>.

¹¹¹ OfCom, *HFSS Advertising Restrictions: Final Review* (26 July 2010) 8 <<http://stakeholders.ofcom.org.uk/market-data-research/other/tv-research/hfss-final-review/>>; Livingstone and Helsper, above n 110, 2-3.

¹¹² OfCom, *HFSS Advertising Restrictions: Final Review*, above n 111, 2.

¹¹³ Sonia Livingstone, 'New Research on Advertising Foods to Children' (Department of Media and Communications, London School of Economics and Political Science, 22 January 2006) <http://stakeholders.ofcom.org.uk/market-data-research/other/tv-research/food_ads/>

advertising works in its influence on children's food preferences, diet and health'.¹¹⁴ Following public consultation, OfCom placed restrictions on advertisements for unhealthy products in and around programs that appeal to children under the age of 16.¹¹⁵

In 2006, WHO commissioned Hastings and colleagues to update their 2003 review as part of a technical forum on food marketing to children.¹¹⁶ Hastings, Cairns and colleague produced another update to the review in a 2009 report, which summarised new research on the extent and nature of food promotion to children, and its effects on their food knowledge, preferences and behaviour.¹¹⁷ This last review found clear evidence supporting the influence of food promotion on children's food preferences, purchase behaviour and consumption.¹¹⁸ In 2013 WHO produced a briefing report that updated evidence on the changing nature of marketing methods and recent policy developments in food marketing to children, as well as research linking advertising and marketing to children's dietary behaviour.¹¹⁹ The report concluded that food advertising promoting unhealthy products remained a concern and that there was a strong link between television viewing and obesity.¹²⁰ The existing literature demonstrated that food advertising influenced children's food preferences and energy intake.¹²¹ Further, the research suggested that children's exposure to unhealthy food advertising influenced children's body weight, independent of other causal pathways between obesity and television viewing.¹²²

In 2004, the US Institute of Medicine established a Committee on Food Marketing and the Diets of Children and Youth. In its 2006 report, the Committee reviewed research on American food and beverage marketing practices, the influence of these practices on young Americans' diets and health and any existing food industry measures to promote healthier foods and beverages to children.¹²³ The Committee examined 123 empirical studies on the

¹¹⁴ Ibid 2.

¹¹⁵ See Committee of Advertising Practice, *The BCAP Code: The UK Code of Broadcast Advertising* (2010) 32.5, 32.5.1 <<http://www.cap.org.uk/Advertising-Codes/~media/Files/CAP/Codesper cent20BCAPper cent20pdf/BCAPper cent20Codeper cent200712.ashx>>. These restrictions are also discussed in Chapter 11.

¹¹⁶ Gerard Hastings et al, 'The Extent, Nature and Effects of Food Promotion to Children: A Review of the Evidence' (World Health Organisation, July 2006) <<http://apps.who.int/iris/handle/10665/43627>>. See World Health Organisation, 'Population-Based Prevention Strategies for Childhood Obesity', above n 6.

¹¹⁷ Cairns, Angus and Hastings, above n 55.

¹¹⁸ Ibid 36.

¹¹⁹ World Health Organisation, 'Marketing of Foods High in Fat, Salt and Sugar to Children: Update 2012-2013', above n 83, 2.

¹²⁰ Ibid 24.

¹²¹ Ibid 35

¹²² Ibid 24, citing Frederick J Zimmerman and Janice F Bell, 'Associations of Television Content Type and Obesity in Children' (2010) 100(2) *American Journal of Public Health* 334.

¹²³ McGinnis, Gootman and Kraak, above n 35, 6.

influence of food and beverage marketing on diets and diet-related health of children and young people.¹²⁴ Its final report proved highly influential, and has been cited in numerous academic studies, as well as in the UK reviews of food advertising research. The section below describes the Committee's findings, as well as those of other prominent reviews and reports.

What the research shows

Children remember and enjoy food advertising, and their most popular advertisements are for unhealthy products.¹²⁵ There is little evidence that food promotion affects children's perceptions of what constitutes a healthy diet, but it may influence specific types of nutrition knowledge.¹²⁶ Both the Hastings/Cairns reviews and the Institute of Medicine found that there was modest to strong evidence that television advertising influenced the food and beverage preferences of children,¹²⁷ and strong evidence that it influenced their purchase requests.¹²⁸ There were more mixed findings in relation to whether food and beverage advertising influenced consumption patterns and diets. However, the Institute of Medicine found that television advertising influenced the short-term consumption of children aged two to 11 years; there was moderate evidence that it influenced the usual dietary intake of children aged two to five years; and weak evidence that it influenced the dietary intake of older children (between six to 11 years of age).¹²⁹ The Cairns review found evidence of a small but significant correlation between television viewing and diet quality, obesity and blood cholesterol levels (although some studies did not disentangle this effect from other causal mechanisms associated with television viewing).¹³⁰ It concluded that there was a statistically

¹²⁴ Ibid 227.

¹²⁵ Hastings et al, 'Review of the Research on the Effects of Food Promotion to Children', above n 103, 3; Cairns, Angus and Hastings, above n 55, 32; Hastings et al, 'The Extent, Nature and Effects of Food Promotion to Children: A Review of the Evidence', above n 116, 27.

¹²⁶ Hastings et al, 'Review of the Research on the Effects of Food Promotion to Children', above n 103, 3; Cairns, Angus and Hastings, above n 55, 28; Hastings et al, 'The Extent, Nature and Effects of Food Promotion to Children: A Review of the Evidence', above n 116, 28.

¹²⁷ Hastings et al, 'Review of the Research on the Effects of Food Promotion to Children', above n 103, 29; Cairns, Angus and Hastings, above n 55, 29; McGinnis, Gootman and Kraak, above n 35, 8; Hastings et al, 'The Extent, Nature and Effects of Food Promotion to Children: A Review of the Evidence', above n 116, 30.

¹²⁸ Hastings et al, 'Review of the Research on the Effects of Food Promotion to Children', above n 103, 31-32; Cairns, Angus and Hastings, above n 55, 30-31; McGinnis, Gootman and Kraak, above n 35, 8; Hastings et al, 'The Extent, Nature and Effects of Food Promotion to Children: A Review of the Evidence', above n 116, 30.

¹²⁹ McGinnis, Gootman and Kraak, above n 35, 8.

¹³⁰ Cairns, Angus and Hastings, above n 55, 32.

significant association between food promotion and children's knowledge, attitudes, behaviours and health status, independent of other influences.¹³¹

Significant limitations remain in the body of research on food advertising to children. Studies tend to focus on televised advertising to primary-school aged children. This is because early research on food advertising used a model based on age-specific stages in children's comprehension of advertising.¹³² This model assumes that children's ability to distinguish between advertising and programming (and to understand the persuasive message of advertising) develops concurrently with their cognitive abilities and media literacy.¹³³ This line of research finds that children start to distinguish between advertising and programming between the ages of four and seven.¹³⁴ Their understanding of the persuasive nature of advertising only begins around the age of eight years.¹³⁵ Children are able to articulate a critical understanding of advertising from around 11 or 12 years of age, but may still require prompting to distinguish between information and persuasion.¹³⁶ These findings suggest that children become better able to defend themselves against marketing messages as they mature.¹³⁷ Also, knowledge about nutrition, media literacy programs in schools and advertising to promote healthy eating and exercise will enhance children's cognitive defences against unhealthy food advertising.¹³⁸ Conversely, adults are assumed to be 'competent consumers' who recognise the commercial nature of advertising and its limits as a source of information.¹³⁹

Also, the majority of research is based on an information-processing model, 'in which persuasion is posited to follow a conscious and rational sequential path from exposure to behaviour'.¹⁴⁰ Thus, studies examine an (assumed) series of relationships between food

¹³¹ Ibid.

¹³² Jennifer L Harris, Kelly D Brownell and John A Bargh, 'The Food Marketing Defence Model: Integrating Psychological Research to Protect Youth and Inform Public Policy' (2009) 3(1) *Social Issues and Policy Review* 211, 216-217.

¹³³ Ibid 217.

¹³⁴ Livingstone and Helsper, above n 110, 2.

¹³⁵ Ibid. See also Wilcox et al, above n 92, 9.

¹³⁶ McGinnis, Gootman and Kraak, above n 35. See also Livingstone, 'A Commentary on the Research Evidence Regarding the Effects of Food Promotion on Children', above n 106, 2.

¹³⁷ Harris, Brownell and Bargh, above n 132, 217. See also Deborah Roedder John, 'Socialisation of Children: A Retrospective Look at Twenty-Five Years of Research' (1999) 26(3) *Journal of Consumer Research* 183.

¹³⁸ Ibid.

¹³⁹ John E Calfee and Deborah Jones Ringold, 'The 70% Majority: Enduring Consumer Beliefs About Advertising' (1994) 13(2) *Journal of Public Policy and Marketing* 228; cited in Sonya A Grier et al, 'Fast-Food Marketing and Children's Fast-Food Consumption: Exploring Parents' Influences in an Ethnically Diverse Sample' (2007) 26(2) *Journal of Public Policy and Marketing* 221, 222.

¹⁴⁰ Harris et al, 'A Crisis in the Marketplace: How Food Marketing Contributes to Childhood Obesity and What Can Be Done', above n 97, 216.

advertising exposure, children's food ideas and beliefs, their consumption choices and actual eating habits. Taken together, these two models limit understanding of how advertising affects older children and adolescents, as well as its more pervasive influence.¹⁴¹ More recent psychological models of advertising's effects draw upon social cognitive theories. These theories predict that repeated exposure to food advertising can trigger beliefs and behaviours without individuals actively and deliberately processing the information presented.¹⁴² Exposure to marketing can have a long-lasting and powerful 'priming' effect, where it encourages children to prefer unhealthy products.¹⁴³

Further there is growing evidence that older children and adults are susceptible to marketing and that these effects occur without conscious deliberation of marketing stimulus.¹⁴⁴ For example, one Australian study found that a single exposure to an advertisement increased both children and adult's desire for, and acceptance of, the unhealthy product advertised.¹⁴⁵ However, there are few studies that examine the influence of advertising through automatic processes, and how such processes might differ according to the developmental stage of the individual.¹⁴⁶

The effects of advertising on teenagers may be enhanced by the growing use of digital media in food promotion. Practices such as social media marketing, advergames and viral marketing are designed to encourage emotion-based and unconscious decision-making processes rather than reasoned and deliberate ones.¹⁴⁷ They also appeal to the developmental needs of older children and adolescents, who are engaged in processes of identity formation and distinguishing themselves from their parents.¹⁴⁸ Social cognitive theories suggest that young people draw upon marketing messages in order to make meaning of the social world, in

¹⁴¹ Janet Hoek and Philip Gendall, 'Advertising and Obesity: A Behavioural Perspective' (2006) 1(4) *Journal of Health Communication: International Perspectives* 409.

¹⁴² For an overview, see Harris, Brownell and Bargh, above 132, 217.

¹⁴³ Ibid 233-235.

¹⁴⁴ Ibid 217. See also Livingstone and Helsper, above n 110, 2; Grier et al, above n 139; Jennifer L Harris, John A Bargh and Kelly D Brownell, 'Priming Effects of Television Food Advertising on Eating Behaviour' (2009) 28(4) *Health Psychology* 404.

¹⁴⁵ Simone Pettigrew et al, 'The Effects of Television and Internet Food Advertising on Parents and Children' (2013) (FirstView Article) *Public Health Nutrition* 1
<<http://journals.cambridge.org/download.php?file=%2FPHN%2FS1368980013001067a.pdf&code=59bd56f47e02cf49b1a15cd526574854>>.

¹⁴⁶ Harris, Brownell and Bargh, above 132, 248.

¹⁴⁷ Kathryn C Montgomery and Jeff Chester, 'Interactive Food and Beverage Marketing: Targeting Adolescents in the Digital Age' (2009) 45(3) *Journal of Adolescent Health* S18, S23-S24. See also Harris, Brownell and J Bargh, above n 132, 214.

¹⁴⁸ Harris, Brownell and Bargh, above n 132, 217.

processes of identity construction and in their relationships with peers and family members.¹⁴⁹ For example, through their exposure to food marketing, children learn that consuming unhealthy foods is fun, normal and ‘cool’, and has few negative consequences.¹⁵⁰ Along with messages from other media, family, peers and social institutions such as schools, food marketing contributes to a sociocultural environment that normalises children’s routine consumption of ‘junk’ food.¹⁵¹ It is difficult to test the role of food marketing in children’s social development processes, and there are few studies that do so.¹⁵² However, research demonstrates that advertising combines with family and peer influences to shape children’s attitudes towards alcohol and tobacco consumption, suggesting that food advertising has similar normative effects.¹⁵³

A further limitation is that research focuses on the effects of marketing on beliefs and behaviours, rather than broader health outcomes such as diet and adiposity.¹⁵⁴ However, more recent studies suggest a causal connection between exposure to food marketing, consumption patterns and obesity, independent of other influences associated with television viewing.¹⁵⁵ For example, one study found a significant association between commercial television viewing and increased BMI among children aged 12 years and younger, even after adjusting for exercise and eating while watching television.¹⁵⁶ However, further research is needed on the causal link between food advertising, dietary habits and adiposity, controlling for other factors such as exposure to television programs or screen viewing time.¹⁵⁷ Although more

¹⁴⁹ Juliet B Schor and Margaret Ford, 'From Tastes Great to Cool: Children's Food Marketing and the Rise of the Symbolic' (2007) 35(1) *Journal of Law, Medicine and Ethics* 10, 16.

¹⁵⁰ Harris et al, 'A Crisis in the Marketplace: How Food Marketing Contributes to Childhood Obesity and What Can be Done', above n 97, 213. See also Harris, Brownell and Bargh, above n 132, 236-237; Hoek and Gendall, above n 141, 414.

¹⁵¹ Ibid; Harris et al, 'A Crisis in the Marketplace: How Food Marketing Contributes to Childhood Obesity and What Can be Done', above n 97, 211; Juliet B Schor, *Born to Buy* (Scribner, 2004); Mary Story et al, 'Creating Healthy Food and Eating Environments: Policy and Environmental Approaches' (2008) 29 *Annual Review of Public Health* 253.

¹⁵² Harris, Brownell and Bargh, above n 132, 237.

¹⁵³ See Cornelia Pechman et al, 'Impulsive and Self-Conscious: Adolescents' Vulnerability to Advertising and Promotion' (2005) 24(2) *Journal of Public Policy and Marketing* 202, cited in Harris, Brownell and Bargh, above n 132, 237.

¹⁵⁴ Harris, Brownell and Bargh, above n 132, 240. See also McGinnis, Gootman and Kraak, above n 35, 292; Story and French, above n 74, 12-13.

¹⁵⁵ Ibid; World Health Organisation 'Marketing of Foods High in Fat, Salt and Sugar to Children: Update 2012-2013', above n 83, 24. See also Jason CG Halford et al, 'Beyond-Brand Effect of Television Food Advertisements on Food Choice in Children: The Effect of Weight Status' (2007) 11(9) *Public Health Nutrition* 897; Leonard H Epstein et al, 'A Randomised Trial of the Effects of Reducing Television Viewing and Computer Use on Body Mass Index in Young Children' (2008) 162(3) *Archives of Paediatrics and Adolescent Medicine* 239.

¹⁵⁶ Zimmerman and Bell, above n 122.

¹⁵⁷ Harris et al, 'A Crisis in the Marketplace: How Food Marketing Contributes to Childhood Obesity and What Can be Done', above n 97, 214.

difficult to design and execute, longitudinal studies are also needed to ‘quantify the effect of accumulated media exposure over time and measure the interactions with other relevant variables’.¹⁵⁸ This is in addition to research on the effects of advertising on older children and adolescents, and in particular children’s response to advertising in new media such as websites and social networking sites.¹⁵⁹

5. Responses to the link between food advertising and obesity

Public health responses

Evidence linking advertising and obesity contributes to growing public concern about unhealthy food marketing to children. In response, public health organisations, researchers, health professionals and parent and consumer representatives pressure governments to introduce wide-ranging statutory restrictions on food advertising.¹⁶⁰ In its 2004 *Global Strategy on Diet, Physical Activity and Health*, WHO raised children’s increased consumption of unhealthy products as a particular concern.¹⁶¹ In May 2006, WHO held a stakeholder forum and expert technical meeting on advertising unhealthy food to children in Norway.¹⁶² The resulting report urged Member States to take ‘bold innovative action at both national and global levels’ in order to reduce food advertising that targeted children, as well as promotions to other age groups to which children were widely exposed.¹⁶³

Following a 2007 resolution of the World Health Assembly,¹⁶⁴ WHO released a set of guidelines for designing state policies to protect children from unhealthy food marketing.¹⁶⁵ Although not calling for a specific regulatory approach, the guidelines endorsed government-led policy that reduced children’s exposure to, and the persuasive power of, unhealthy food

¹⁵⁸ Ibid.

¹⁵⁹ Wilcox et al, above n 92, 24; Harris et al, 'A Crisis in the Marketplace: How Food Marketing Contributes to Childhood Obesity and What Can be Done', above n 97, 213; Livingstone, 'A Commentary on the Research Evidence Regarding the Effects of Food Promotion on Children', above n 106, 13.

¹⁶⁰ See, e.g., Anne E Matthews, 'Children and Obesity: A Pan-European Project Examining the Role of Food Marketing' (2007) 18(1) *European Journal of Public Health* 7, 9-10.

¹⁶¹ World Health Organisation, 'Global Strategy on Diet, Physical Activity and Health' (World Health Organisation, 2004) 2 <<http://www.who.int/dietphysicalactivity/strategy/eb11344/en/index.html>>. See also C Hawkes and T Lobstein, 'Regulating the Commercial Promotion of Food to Children: A Survey of Actions Worldwide' (2011) 6(2) *International Journal of Paediatric Obesity* 83.

¹⁶² See World Health Organisation, 'Population-Based Prevention Strategies for Childhood Obesity', above n 6.

¹⁶³ Ibid 29. For an overview of WHO’s activities in this area, see World Health Organisation, 'Marketing of Foods High in Fat, Salt and Sugar to Children: Update 2012-2013', above n 83.

¹⁶⁴ World Health Organisation, *Prevention and Control of Noncommunicable Diseases: Implementation of the Global Strategy*, 60th World Health Assembly, Agenda Item 12.8, WHO Doc WHA60.23 (23 May 2007) cl 2(6) <http://apps.who.int/gb/ebwha/pdf_files/WHA60/A60_R23-en.pdf>.

¹⁶⁵ World Health Organisation, 'Set of Recommendations on the Marketing of Foods and Non-Alcoholic Beverages to Children', above n 86.

marketing.¹⁶⁶ WHO published a framework for implementing the recommendations in early 2012, which elaborated on processes of policy development, implementation, monitoring and enforcement.¹⁶⁷ Following its most recent review of the evidence on food marketing, it also called for national governments to introduce stronger controls on the advertising of unhealthy food to children.¹⁶⁸

Non-government organisations have advocated for restrictions on food advertising to children at both national and international levels. In 2006, an International Obesity Taskforce launched the 'Sydney Principles', which outlined criteria for food advertising regulation based on a human rights approach.¹⁶⁹ The principles called for statutory regulation of all forms of food marketing, with the goals of substantially protecting children from food promotion and creating advertising-free childhood settings.¹⁷⁰ In 2007, the Taskforce released a draft code on food marketing jointly with Consumers International.¹⁷¹ The code described restrictions on advertising food to children based on an international approach to categorising unhealthy products and a broad definition of 'marketing to children'.¹⁷² More recently, Consumers International developed a set of guidelines for monitoring food advertising.¹⁷³

NGOs, consumer organisations and health advocates also publish reports on the extent and nature of food advertising to children and its impact on children's health.¹⁷⁴ The Australian public health community has taken extensive local action on childhood obesity and food advertising. For example, prominent public health organisations joined together in an Obesity Policy Coalition, which published a legislative blueprint for comprehensive, national-level

¹⁶⁶ Ibid.

¹⁶⁷ World Health Organisation, 'A Framework for Implementing the Set of Recommendations on the Marketing of Foods and Non-Alcoholic Beverages to Children' (World Health Organisation, 2012) <http://www.who.int/dietphysicalactivity/framework_marketing_food_to_children/en/>.

¹⁶⁸ Ibid. See also Kate Kelland, 'WHO Urges Tougher Food Marketing Rules to Curb Childhood Obesity', *Reuters* (online) 18 June 2013 <<http://www.reuters.com/article/2013/06/18/us-obesity-who-europe-idUSBRE95H0F220130618>>.

¹⁶⁹ Boyd Swinburn et al, 'The "Sydney Principles" for Reducing the Commercial Promotion of Foods and Beverages to Children' (2007) 11(9) *Public Health Nutrition* 881.

¹⁷⁰ Ibid 883.

¹⁷¹ International Association for the Study of Obesity, Consumers International and International Obesity Taskforce, 'Recommendations for an International Code on Marketing of Foods and Non-Alcoholic Beverages to Children' (Consumers International, March 2008) <<http://www.consumersinternational.org/our-work/food/key-projects/junk-food-generation/our-activity>>.

¹⁷² Ibid 8.

¹⁷³ Consumers International, 'Manual for Monitoring Food Marketing to Children' (Consumers International, September 2011) <<http://www.consumersinternational.org/media/795222/food-manual-english-web.pdf>>.

¹⁷⁴ World Health Organisation, 'Marketing of Foods High in Fat, Salt and Sugar to Children: Update 2012-2013', above n 83, 1.

restrictions on unhealthy food advertising to children.¹⁷⁵ Chapter 10 further describes how public health organisations have advocated for stronger restrictions on food advertising to children, and their influence on food industry self-regulation in Australia.

Industry responses

In the early 2000s the food and advertising industries developed their own initiatives on food marketing to children. In 2004, the global business organisation the International Chamber of Commerce published a *Framework for Responsible Food and Beverage Communication*, which included guidelines for marketing to children.¹⁷⁶ Shortly before this move, the Confederation of the Food and Drink Industries of the EU released a similar set of principles on food and beverage advertising.¹⁷⁷ These documents prohibit advertising that promotes excessive consumption, undermines the promotion of healthy diets or obscures the distinction between programs, editorial content and promotion.¹⁷⁸ Advertising industry bodies in a number of jurisdictions have translated these guidelines into codes for national application.¹⁷⁹ Chapter 2 describes how Australian advertising industry codes on food marketing and advertising to children deal with similar concerns.¹⁸⁰ However, researchers criticise these codes for failing to address the quantity and frequency of food advertising in a range of media, or the nutritional quality of products advertised to children.¹⁸¹

Food and beverage manufacturers responded to community concerns by creating industry-level pledges on food advertising to children. Pledges take the form of a code of practice outlining a set of principles on responsible marketing practices, accompanied by processes of

¹⁷⁵ MacKay et al, above n 39. See also Lumley, Martin and Antonopoulos, above n 67.

¹⁷⁶ ICC Commission on Marketing and Advertising, *Framework for Responsible Food and Beverage Marketing Communications 2012* (2012) International Chamber of Commerce <<http://www.iccwbo.org/Advocacy-Codes-and-Rules/Document-centre/2012/Framework-for-Responsible-Food-and-Beverage-Marketing-Communications-2012/>>.

¹⁷⁷ Corinna Hawkes 'Marketing Food to Children: Changes in the Global Regulatory Environment 2004-2006' (World Health Organisation, 2007) 10 <http://www.who.int/dietphysicalactivity/publications/regulatory_environment_2007/en/>.

¹⁷⁸ ICC Commission on Marketing and Advertising, above n 176; Harris et al, 'A Crisis in the Marketplace: How Food Marketing Contributes to Childhood Obesity and What Can be Done', above n 97, 211; World Health Organisation, 'Marketing of Foods High in Fat, Salt and Sugar to Children: Update 2012-2013', above n 83, 21.

¹⁷⁹ Hawkes, 'Marketing Food to Children: Changes in the Global Regulatory Environment 2004-2006', above n 177, 10.

¹⁸⁰ See Australian Association of National Advertisers, *AANA Code for Marketing and Advertising Communications to Children* (May 2008) <<http://www.aana.com.au/pages/aana-code-for-advertising-marketing-communications-to-children.html>>; Australian Association of National Advertisers, *AANA Food and Beverages Advertising and Marketing Communications Code* (August 2009) <<http://www.aana.com.au/data/Documents/Codes/AANAFoodandBeveragesCodeAugust2009.pdf>>.

¹⁸¹ Harris et al, 'A Crisis in the Marketplace: How Food Marketing Contributes to Childhood Obesity and What Can be Done', above n 97, 217; Sarah MacKay, 'Food Advertising and Obesity in Australia: To What Extent Can Self-Regulation Protect the Interests of Children?' (2009) 35 *Monash University Law Review* 118.

implementation, monitoring and review.¹⁸² Companies that join these pledges write ‘commitments’ describing the specific steps they will take to put responsible marketing principles into operation at a company level.¹⁸³ One of the first examples of this form of self-regulation was the US *Children’s Food and Beverage Advertising Initiative* (CFBAI), established in 2006 to shift advertising to children towards healthier foods and beverages.¹⁸⁴ Table 1 describes core principles found in the main code document.

Similar initiatives have spread quickly to other jurisdictions: between 2005 and 2009 the food industry developed 13 pledges on food marketing to children,¹⁸⁵ including regional and international pledges such as the *International Council of Beverages Associations’ Guidelines on Marketing to Children*¹⁸⁶ and the EU Pledge,¹⁸⁷ as well as commitments made by companies under the *EU Platform on Diet, Physical Activity and Health*.¹⁸⁸ Many national and international initiatives have also been revised to place more demanding restrictions on food companies.¹⁸⁹ Thus, food industry self-regulation developed rapidly and demonstrates a relatively flexible response to criticisms about its performance.¹⁹⁰ However, these initiatives have been criticised by NGOs for their exclusion of some marketing techniques and media channels, inconsistencies between companies’ commitments and the fact that they set weak standards for compliance.¹⁹¹

¹⁸² Hawkes, 'Marketing Food to Children: Changes in the Global Regulatory Environment 2004-2006', above n 177, 15; Corinna Hawkes and Jennifer Harris, 'An Analysis of the Content of Food Industry Pledges on Marketing to Children' (2011) 14(8) *Public Health Nutrition* 1403, 1404.

¹⁸³ Hawkes and Harris, above n 182, 2.

¹⁸⁴ Better Business Bureau, *Children's Food and Beverage Advertising Initiative* (2013) <<http://www.bbb.org/us/childrens-food-and-beverage-advertising-initiative/>>. See also Parke Wilde, 'Self-Regulation and the Response to Concerns about Food and Beverage Marketing to Children in the United States' (2009) 67(3) *Nutrition Reviews* 155, 163.

¹⁸⁵ Hawkes and Harris, above n 182.

¹⁸⁶ International Council of Beverages Associations, *International Council of Beverages Associations Guidelines on Marketing to Children* (2008) <<http://www.icba-net.org/policies-guidelines/marketing-to-children/>>.

¹⁸⁷ EU Pledge, *Enhanced 2012 Commitments* (2013) <<http://www.eu-pledge.eu/content/enhanced-2012-commitments>>.

¹⁸⁸ Directorate General Health and Consumers, *EU Platform for Action on Diet, Physical Activity and Health* (9 July 2013) European Commission <http://ec.europa.eu/health/nutrition_physical_activity/platform/index_en.htm>.

¹⁸⁹ See World Health Organisation, 'Marketing of Foods High in Fat, Salt and Sugar to Children: Update 2012-2013', above n 83, 21; Hawkes and Harris, above n 182.

¹⁹⁰ Hawkes and Harris, above n 182.

¹⁹¹ See, e.g., Tim Lobstein, Triin Parn and Ange Aikenhead, *A Junk-Free Childhood: Responsible Standards for Marketing Foods and Beverages to Children* (June 2011) International Association for the Study of Obesity <http://www.iaso.org/site_media/uploads/IASO_food_marketing_report_30_June_2011.pdf>; Mikaela Persson et al, *A Junk-Free Childhood: The 2012 Report of the StanMark Project on Standards for Marketing Food and Beverages to Children in Europe* (July 2012) International Association for the Study of Obesity <http://www.iaso.org/site_media/uploads/A_Junk-free_Childhood_2012.pdf>.

Table 1. Core principles of the US *Children’s Food and Beverage Advertising Initiative*¹⁹²

Advertising to children under 12	Media	Use of products in interactive games	Use of licensed characters, celebrities and movie tie-ins	Product placement	Advertising in elementary schools
<p>All advertising ‘primarily directed to children under 12’ must be for healthier choice’/better for you’ products in accordance with company-developed criteria that are consistent with established scientific/government standards.</p> <p>Participants should use healthy lifestyle messaging that encourages physical activity/good dietary habits, consistent with established scientific/government standards.</p>	<p>Applies to television, print, radio, internet (third-party websites) where the audience >35% children.</p> <p>Applies to advertising in media primarily directed to children according to its content, e.g. direct marketing, company-owned websites/microsites, video games and DVDs that are rated as appropriate for children or whose content is primarily directed to children.</p>	<p>Where interactive games that are primarily directed to children incorporate a participant’s food or beverage product, it must be a healthy dietary choice/better for you product.</p>	<p>The use of licensed characters, celebrities and movie tie-ins must be consistent with companies’ advertising commitments.</p> <p>This principle explicitly excludes point-of-sale material and product packaging, as well as company-owned characters.</p>	<p>Participants will not pay for or actively seek to place their products in the program or editorial content of any medium primarily directed to children under 12 for the purpose of promoting the sale of those products.</p>	<p>Participants will not advertise branded products in elementary (primary) schools.</p>

¹⁹² Better Business Bureau, *Children’s Food and Beverage Advertising Initiative Program and Core Principles Statement* (September 2011) <<http://www.bbb.org/us/childrens-food-and-beverage-advertising-initiative/info/>>.

Governments' response

National governments have been slower to respond to concerns about advertising and obesity, despite increasing demand for policies and regulation that address the promotion of unhealthy food to children.¹⁹³ In developed countries, most governments encourage self-regulation as a first response to the problem.¹⁹⁴ However, states are demanding more from self-regulation than in the past, meaning that voluntary initiatives often operate within a framework of government intervention and oversight.¹⁹⁵ For example, the Spanish *Self-Regulatory Code on Food Advertising to Children* is implemented by a committee that includes a representative of the Spanish Food Safety Agency,¹⁹⁶ and companies must submit their advertising to a 'pre-copy' advice service to ensure compliance.¹⁹⁷ Many other EU Member States have introduced self-regulatory codes on food advertising to children, operating within a framework of general advertising regulation.¹⁹⁸

In some jurisdictions self-regulation follows unsuccessful attempts to restrict advertising through government legislation.¹⁹⁹ In others, governments threaten the food industry with more intrusive forms of regulation, should voluntary measures fail to reduce children's exposure to unhealthy food advertising.²⁰⁰ A few countries have successfully passed statutory controls on food advertising, such as the UK's co-regulatory restrictions on unhealthy food advertising in and around programs of particular appeal to children.²⁰¹ However, even where self-regulation predominates, there are close relationships between government and industry action to reduce unhealthy food marketing to children, with governments often encouraging, directing or supporting voluntary industry initiatives.

¹⁹³ Hawkes and Lobstein, above n 161, 89.

¹⁹⁴ Ibid 89.

¹⁹⁵ Ibid.

¹⁹⁶ Hawkes, 'Marketing Food to Children: Changes in the Global Regulatory Environment 2004-2006', above n 177, 24; Hawkes and Lobstein, above n 161, 89.

¹⁹⁷ Hawkes and Lobstein, above n 161, 89.

¹⁹⁸ See World Health Organisation, 'Marketing of Foods High in Fat, Salt and Sugar to Children: Update 2012-2013', above n 83, 17-19.

¹⁹⁹ In Italy, for example, food industry lobbying resulted in a legislative ban in food advertising being overturned. See Hawkes, 'Marketing Food to Children: Changes in the Global Regulatory Environment 2004-2006', above n 177, 89.

²⁰⁰ Hawkes and Lobstein, above n 161, 90. See, e.g., Department of Health, *Choosing Health: Making Healthier Choices Easier* (HM Government, 2004)

<http://webarchive.nationalarchives.gov.uk/20130107105354/http://www.dh.gov.uk/prod_consum_dh/groups/dh_digitalassets/@dh/@en/@ps/documents/digitalasset/dh_133489.pdf>. In this white paper the UK Department of Health said that the Government would tighten restrictions on broadcast food and beverage advertising to children and work with industry groups to strengthen voluntary controls on non-broadcast forms of promotion. The Government would then monitor these measures and implement legislative controls if softer measures failed to change the nature and volume of food advertising to children.

²⁰¹ See Committee of Advertising Practice, above n 115.

6. The development of food advertising regulation in Australia

Regulatory action in Australia followed a similar pattern to international developments. Following a government review of standards regulating children's television programs (described below), in 2009 the food industry introduced two self-regulatory initiatives regarding advertising directed to children. These are *The Responsible Children's Marketing Initiative of the Australian Food and Beverage Industry* (RCMI)²⁰² and the Australian Quick Service Restaurant Industry's *Initiative for Responsible Advertising and Marketing to Children* (QSRI).²⁰³ These initiatives take a similar form to food industry 'pledges' in other jurisdictions: they comprise a core code document, accompanied by individual commitments from companies that join the initiatives, and mechanisms for administering, monitoring and reviewing the self-regulatory system. Table 2 sets out the key principles found in the codes. The RCMI and QSRI require that food advertising 'directed primarily to children' be for 'healthier choice' products, determined by reference to nutritional criteria.²⁰⁴ The RCMI permits companies to select their own nutrition profiling model for determining 'healthier choice' products. Alternatively they may use criteria developed by government and non-government organisations.²⁰⁵ The QSRI requires that signatories use a standard nutrient profile model that is attached to the code.²⁰⁶ The initiatives also place restrictions on the use of marketing techniques commonly used to promote foods and beverages to children, including premium offers, licensed characters, advergames, and school-based marketing.

²⁰² Australian Food and Grocery Council, *Responsible Children's Marketing Initiative of the Australian Food and Beverage Industry* (March 2011) <<http://www.afgc.org.au/industry-codes/advertising-kids.html>>.

²⁰³ Australian Quick Service Restaurant Industry, *Initiative for Responsible Advertising and Marketing to Children* (June 2009) Australian Association of National Advertisers <<http://www.aana.com.au/QuickServiceRestaurantInitiative.htm>>. The quick service restaurant industry amended the QSRI following an independent review in 2011. The revised version of the code came into effect in March 2012; however I refer to the original edition as much of my research took place before the introduction of the new code. Chapter 6 discusses the revisions to the QSRI, as well as those to the RCMI that will take effect in January 2014. See also Australian Food and Grocery Council, *AFGC QSRI Initiative for Responsible Advertising and Marketing to Children* (2013) <<http://www.afgc.org.au/industry-codes/advertising-to-children/qsr-initiative.html>>.

²⁰⁴ Australian Food and Grocery Council, above n 202 1; Australian Quick Service Restaurant Industry, above n 203, 1.

²⁰⁵ Australian Food and Grocery Council, above n 202, 2.

²⁰⁶ Australian Quick Service Restaurant Industry, above n 203, 1.

Table 2. The core principles of the RCMI and QSRI ²⁰⁷

Code	Core principles	Media	Popular personalities, characters	Product placement	Interactive games	Advertising in schools	Use of premium offers
RCMI	No advertising to children (under 12) unless: 1. Products represent healthy dietary choices, consistent with scientific or government standards and 2. advertising references/is in the context of a healthy lifestyle through messaging encouraging good dietary habits and physical activity.	Television, radio, print, cinema, third-party internet sites where audience is predominantly children and/or directed primarily to children, according to theme, visuals or language. Television: programs classified for children's viewing, programs with >50% audience under 12, G rated programs that are designed for children.	Popular personalities, program characters, licensed characters not to be used in advertising directed primarily to children unless it complies with the core principles.	Not to be used in any medium directed primarily to children unless products are consistent with core principle no 1.	Where interactive game incorporates participants' products, it must be consistent with the core principles.	No product promotion in primary schools unless requested by/ agreed with the school admin for educational/ informational purposes, or related to healthy lifestyle activities, supervised by school admin/ appropriate adults.	Not to be used unless the reference to the premium is 'merely incidental'.
QSRI*	Advertising/marketing to children (under 14) must: (a) Represent healthier choices, determined by set nutrition criteria, and/or (b) Represent a healthy lifestyle, through messaging that encourages: (i) healthier choices, as determined by a defined set of nutrition criteria (ii) physical activity.	Television, radio, newspapers, magazines, outdoor billboards and posters, emails, interactive games, cinema and internet sites.	Use of popular personalities or licensed characters in advertising to children must be compliant with core principles.	Can only be used in media directed to children where consistent with (a).	Participants to ensure as far as possible that any interactive game including products sold by participants and directed primarily to children are consistent with (b).	No product promotion in schools, unless specifically requested by/ agreed with, the school admin, or related to healthy lifestyle activities supervised by school admin/ appropriate adults.	Not to be used in any medium directed primarily to children unless reference to premium is 'merely incidental'.

* The QSRI contains additional provisions related to nutrition information disclosure and product packaging not included in this table.

²⁰⁷ This table has also been published in Belinda Reeve, 'Private Governance, Public Purpose? Assessing Transparency and Accountability in Self-Regulation of Food Advertising to Children' (2013) 10(2) *Journal of Bioethical Inquiry* 149.

Food industry self-regulation evolved out of government interest in chronic disease prevention, beginning in the early 2000s.²⁰⁸ In 2009, the House of Representatives Standing Committee on Health and Ageing released a report on obesity prevention, which noted community concerns about inadequate regulation of food advertising to children.²⁰⁹ The Committee recommended a ‘phased’ approach to reducing unhealthy food marketing to children, beginning with self-regulation of unhealthy food advertising on television during children’s prime viewing times.²¹⁰ The Committee also recommended that the Federal government consider ‘more stringent regulations’ should self-regulation fail to achieve this goal.²¹¹

In March 2007 Australia’s government broadcasting regulator, the Australian Communications and Media Authority (ACMA), began a review of the *Children’s Television Standards* (CTS) 2005.²¹² These standards regulate the content of children’s programs and non-program material (including advertising) during designated children’s programs on free-to-air television.²¹³ A key issue for the review was whether the ACMA should impose additional requirements on food and beverage advertising, in light of community concern about unhealthy food advertising to children.²¹⁴ To inform its review, the ACMA commissioned a series of research reports, including an independent literature review (the ‘Brand Review’) on television food advertising to children and its relationship to children’s food and beverage preferences.²¹⁵ In a preliminary 2008 report, the ACMA took the position that it should not impose any additional restrictions on food and beverage advertising, based partly on the fact that the Brand review did not find a causal relationship between food advertising, children’s food knowledge, preferences and purchase requests (although it did

²⁰⁸ See House of Representatives Standing Committee on Health and Ageing, Parliament of Australia *Weighing It Up: Obesity in Australia* (2009) 9

<http://www.aph.gov.au/parliamentary_business/committees/house_of_representatives_committees?url=haa/.obesity/report.htm>.

²⁰⁹ Ibid 73.

²¹⁰ Ibid.

²¹¹ Ibid 76.

²¹² Australian Communications and Media Authority, *Children’s Television Standards Review* (25 July 2012) <http://www.acma.gov.au/WEB/STANDARD/703041/pc=PC_310262>.

²¹³ See Australian Communications and Media Authority, *Children’s Television Standards 2009* (at 11 July 2013); Australian Communications and Media Authority, ‘Children’s Television Standards 2009: Explanatory Statement’ (Australian Government, August 2009) 1

<http://www.acma.gov.au/WEB/STANDARD/pc=PC_310262>.

²¹⁴ Australian Communications and Media Authority, ‘Review of the Children’s Television Standards 2005: Report of the Review’ (Australian Government, 2008) 10

<http://www.acma.gov.au/WEB/STANDARD/pc=PC_310262>.

²¹⁵ Jeffrey E Brand, ‘Television Advertising to Children: A Review of Contemporary Research on the Influence of Television Advertising Directed to Children’ (Australian Communications and Media Authority, May 2007) <http://www.acma.gov.au/WEB/STANDARD/pc=PC_310262>.

establish a correlation between these factors).²¹⁶ Therefore, the benefits of additional restrictions on food advertising were unclear.²¹⁷

The ACMA also undertook economic modelling of the costs and benefits of food advertising restrictions.²¹⁸ It estimated the costs of different regulatory options including banning unhealthy food advertising and all forms of food advertising during certain times of the day. It measured these costs in terms of the value of advertising lost due to the bans, as well as loss of broadcaster revenue.²¹⁹ It also estimated the percentage reduction in obesity-related costs that would be required for advertising restrictions to have a net benefit to society.²²⁰ The modelling exercise found that all regulatory options produced significant impacts on broadcaster revenue and profitability, which would not be outweighed by reductions in obesity-related costs that resulted from the bans.²²¹ A ban on food and beverage advertising on commercial television could impact upon future investment in the television industry, as well as program quality.²²² As a result, the ACMA declined to further restrict food advertising to children.²²³ However, it called on the food industry ‘to have regard to the strong concerns of interested parties in this area and consider how it can effectively address these concerns without additional regulation’.²²⁴

On 1 January 2009, the Australian food industry’s trade association, the Australian Food and Grocery Council (AFGC), introduced the RCMI.²²⁵ It developed this code in collaboration with the Australian Association of National Advertisers (AANA) – the advertising industry’s representative body.²²⁶ On 25 June 2009, the AANA announced the introduction of the QSRI, created by the Australian quick service restaurant industry in consultation with the AANA.²²⁷ In its final report of the CTS review, the ACMA referred to these initiatives in its decision not to impose any additional requirements on food and beverage advertising. However, it said that it would monitor the codes over a 12 month period in order to determine their

²¹⁶ ACMA, 'Review of the Children's Television Standards 2005: Report of the Review', above n 214, 10.

²¹⁷ Ibid 12.

²¹⁸ Ibid 11-12, app A; Australian Communications and Media Authority, 'Review of the Children's Television Standards 2005: Final Report of the Review' (Australian Government, August 2009) 5-9, app 2

<<http://www.acma.gov.au/Industry/Broadcast/Television/Childrens-TV/childrens-television-standards-review>>

²¹⁹ Australian Communications and Media Authority, 'Review of the Children's Television Standards 2005: Final Report of the Review', above n 218, 6.

²²⁰ Ibid.

²²¹ Ibid 9.

²²² Ibid 6.

²²³ Ibid 9.

²²⁴ Ibid.

²²⁵ Ibid 7.

²²⁶ Ibid.

²²⁷ Ibid 7.

effectiveness.²²⁸ In December 2011 the ACMA released its monitoring report on industry self-regulation.²²⁹ The report found that the initiatives had not addressed community concerns about food advertising and that ‘any real-life change in the level of children’s exposure to food and beverage advertising on free-to-air television is unclear’.²³⁰

The National Preventative Health Taskforce noted the creation of the RCMI in its 2009 report on chronic disease prevention.²³¹ The federal Labor Government had established the Taskforce in 2008 to develop ways to address the main modifiable risk factors for non-communicable diseases, namely tobacco smoking, excess alcohol consumption and obesity.²³² The following year, the Taskforce released its strategy to reduce chronic disease: *Australia: the Healthiest Country by 2020*. The strategy took a ‘responsive’ regulatory approach to addressing market-based influences on obesity, tobacco and excessive alcohol consumption. It conceptualised this approach as:²³³

... a staged and potentially escalating approach to change, allowing for ‘soft’ mechanisms to be trialled, such as voluntary change, self-regulation, co-design, public reporting or positive incentives. Where appropriate, rather than opting immediately for harder mechanisms of regulation, enforcement or fiscal sanctions, the results are measured and assessed, with action to follow if necessary.

In line with this approach, the Taskforce recommended a phased strategy for reducing children’s exposure to unhealthy food advertising, marketing and sponsorship. The steps in this strategy were:²³⁴

- Phasing out unhealthy food advertising on free-to-air and pay television before 9pm within four years of the report;

²²⁸ Ibid 9.

²²⁹ Australian Communications and Media Authority, 'Industry Self-Regulation of Children’s Food and Beverage Advertising: ACMA Monitoring Report' (Australian Government, 2011) <<http://engage.acma.gov.au/kids-food-ads/>>. This report is discussed in more detail in Chapter 4.

²³⁰ Ibid 6.

²³¹ National Preventative Health Taskforce, 'National Preventative Health Strategy - The Roadmap for Action' (Commonwealth of Australia, 2009) 123

<<http://www.preventativehealth.org.au/internet/preventativehealth/publishing.nsf/Content/national-preventative-health-strategy-11p>>.

²³² National Preventative Health Taskforce, 'Australia: The Healthiest Country by 2020 - National Preventative Health Strategy - Overview' (Commonwealth of Australia, 2009) 5

<<http://www.preventativehealth.org.au/internet/preventativehealth/publishing.nsf/Content/national-preventative-health-strategy-11p>>.

²³³ National Preventative Health Taskforce, 'National Preventive Health Strategy - The Roadmap for Action', above n 231, 67.

²³⁴ Ibid 125.

- Phasing out the use of premium offers, toys, competitions and promotional characters (including celebrities and cartoon characters) to market unhealthy products to children; and
- Developing of a set of definitions and criteria for identifying unhealthy food products.

The Taskforce also noted significant limitations in the food industry's scheme, including its voluntary nature, a lack of sanctions for non-compliance, and the fact that it did not provide set criteria for identifying unhealthy products that could not be advertised to children.²³⁵ It recommended that the Federal government monitor and evaluate the impact of the RCMI on reducing children's exposure to unhealthy food advertising.²³⁶ The Government could then identify any shortfalls in the current voluntary approach and address these through the introduction of a co-regulatory arrangement. After monitoring the efficacy of co-regulation, the Government would introduce legislation if softer measures were ineffective in achieving the goals outlined above.²³⁷

In 2010 the Federal government released its response to the Taskforce's report, *Taking Preventive Action: A Response to Australia: The Healthiest Country by 2020*.²³⁸ The Government 'noted' the Taskforce's recommendations for reducing children's exposure to unhealthy advertising, but did not agree to statutory regulation of food advertising to children.²³⁹ Instead, it described existing measures for changing the food advertising environment, including the creation of the RCMI and QSRI following 'government encouragement,' funding to national broadcasters to support a children's channel providing advertising free programs and the ACMA's review and amendment of the CTS 2005.²⁴⁰ The Government committed to monitoring the effectiveness of the RCMI and QSRI in reducing children's exposure to unhealthy food advertising, which it said was 'consistent with the Taskforce recommendations which propose a staged and potentially escalating approach to change'.²⁴¹ Following this report, the Government tasked the Australian National Preventive

²³⁵ Ibid 123.

²³⁶ Ibid 127.

²³⁷ Ibid.

²³⁸ Australian Government, 'Taking Preventative Action: A Response to Australia: The Healthiest Country by 2020, The Report of the National Preventative Health Taskforce' (Commonwealth of Australia, 2010) <<http://www.preventativehealth.org.au/>>.

²³⁹ Ibid 46.

²⁴⁰ Ibid.

²⁴¹ Ibid 47.

Health Agency (ANPHA) (an independent public health agency) with monitoring and evaluating the efficacy of the two food industry initiatives.²⁴²

Following the government's failure to strengthen existing regulatory controls, Australian political groups sought to introduce legislation restricting food advertising to children. In September 2008, Senator Bob Brown (the then leader of the Australian Greens Party) introduced a Private Senator's Bill to ban food and beverage advertising during children's television viewing times.²⁴³ The Senate referred the Bill to an inquiry by the Senate Standing Committee on Community Affairs.²⁴⁴ The Committee's report noted a number of developments in the area of food advertising regulation, including the CTS review and the creation of the RCMI.²⁴⁵ The Committee concluded that it was 'premature to bring forward legislative changes to food and beverage advertising' before the food industry's initiative could be properly assessed.²⁴⁶ Accordingly, the Bill failed to pass. In 2010 Senator Brown reintroduced the Bill into the Senate, but was again opposed by Government and the opposition.²⁴⁷ In November 2011 the Senator introduced a second Bill that sought to ban unhealthy food advertising during children's programming and peak viewing periods.²⁴⁸ As at July 2013, the Bill remained before Senate.²⁴⁹ However, it seems unlikely to gain political support given the government's agreement to monitor the food industry initiatives before considering alternative forms of regulation.

²⁴² Ibid. See also Australian National Preventive Health Agency, *Strategic Plan 2011-2015* (2011) 17 Australian Government <<http://anpha.gov.au/internet/anpha/publishing.nsf/Content/strategic-plan>>.

²⁴³ The Protecting Children from Junk Food Advertising (Broadcasting Amendment) Bill 2008 acted by amending the *Broadcasting Services Act 1992* (Cth) to prohibit food and beverage advertising between 6am until 9.30pm (sch 1). It also amended the *Schools Assistance (Learning Together – Achievement Through Choice and Opportunity) Act 2004* (Cth) to require that schools not display food advertising or make sponsorship announcements, as a condition of financial assistance (sch 2).

²⁴⁴ Rhonda Jolly, 'Marketing Obesity? Junk Food, Advertising and Kids' (Research Paper No 9, Parliamentary Library, Parliament of Australia, 2011) 3 <<http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22library%2Fprspub%2F481449%22>>.

²⁴⁵ Standing Committee on Community Affairs, The Senate, Protecting Children from Junk Food Advertising (Broadcasting Amendment) Bill 2008 (2008)17.

²⁴⁶ Ibid 17-18.

²⁴⁷ Commonwealth of Australia, *Parliamentary Debates* Senate, 21 November 2011, 9013 (Bob Brown). See also Jolly, above n 244, 34.

²⁴⁸ The Protecting Children From Junk Food Advertising (Broadcasting and Telecommunications Amendment) Bill 2011 restricts unhealthy food advertising during children's peak television viewing periods, on subscription broadcast services intended for or primarily watched by children, on the internet, and by 'commercial electronic message'. As with the prior Greens bill, restrictions would take effect through amendments to the *Broadcasting Services Act 1992* (Cth).

²⁴⁹ See Parliament of Australia, *Protecting Children from Junk Food Advertising (Broadcasting and Telecommunications Amendment Bill 2011* (undated) <http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=s827>.

7. Arguments for government regulation of food advertising to children

Children's vulnerability to advertising

Public health advocates support the Greens' bid for tougher restrictions on food advertising. They argue that states have a responsibility to protect children's health on the basis that children are a vulnerable population group.²⁵⁰ Because of their limited cognitive development, children cannot make genuinely free consumption choices.²⁵¹ In particular, food advertising directed to children under the age of eight is widely considered unethical because of their inability to distinguish between marketing and editorial content (as described above).²⁵² Thus, for many public health advocates, '[t]he intense marketing of high fat, high sugar foods to young children can be viewed as exploitation because they do not understand that commercials are designed to sell products and do not have the ability to comprehend or evaluate advertising'.²⁵³ Further, advertising's influence on children's consumption patterns extends into adulthood, as food preferences and behaviours develop early in life and predict children's future consumption habits and diet-related health.²⁵⁴

The state's duty to protect children from harmful advertising practices finds expression in Australia's international law obligations.²⁵⁵ For example, article 17 of the *United Nations Convention on the Rights of the Child* (UNCROC) requires that States' Parties protect children from information and material that is injurious to their wellbeing.²⁵⁶ Other United Nations documents grant children the right to adequate food²⁵⁷ and freedom from obesity.²⁵⁸ A

²⁵⁰ See, e.g., Wilcox et al, above n 92, 23; World Health Organisation, 'Marketing of Foods High in Fat, Salt and Sugar to Children: Update 2012-2013', above n 83, 9; Nuffield Council on Bioethics, 'Public Health: Ethical Issues' (Nuffield Council on Bioethics, 2007) para 2.44 <<http://www.nuffieldbioethics.org/public-health>>.

²⁵¹ Committee on Communications, above n 90, 2563; Nuffield Council on Bioethics, above n 250, 89.

²⁵² See, e.g., Wilcox et al, above n 92, 21.

²⁵³ Story and French, above n 74, 16.

²⁵⁴ McGinnis, Gootman and Kraak, above n 35, 73; Nuffield Council on Bioethics, above n 250, 89.

²⁵⁵ See Swinburn et al, 'The "Sydney Principles" for Reducing the Commercial Promotion of Foods and Beverages to Children', above n 169; Richard Ingleby, Lauren Prossner and Elizabeth Waters, 'UNCROC and the Prevention of Childhood Obesity: The Right Not to Have Food Advertisements on Television' (2008) 16(1) *Journal of Law and Medicine* 49; Louise Thornley, Louise Signal and George Thomson, 'Does Industry Regulation of Food Advertising Protect Child Rights?' (2010) 1 *Critical Public Health* 25.

²⁵⁶ *United Nations Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990). See also Ingleby, Prossner and Waters, above n 255, 49-50.

²⁵⁷ Committee on Economic, Social and Cultural Rights, *General Comment 12: The Right to Adequate Food (Art 11)*, 20th sess, UN Doc E/C.12/1999/5 (12 May 1999). See also Swinburn et al, 'The "Sydney Principles" for Reducing the Commercial Promotion of Foods and Beverages to Children,' above n 169, 882.

²⁵⁸ United Nations Standing Committee on Nutrition, *The Human Right of Children and Adolescents to Adequate Food and to be Free from Obesity and Related Diseases: The Responsibilities of Food and Beverage Corporations and Related Media and Marketing Industries. Statement by the Working Groups on Nutrition throughout the Lifecycle and Nutrition, Ethics and Human Rights on the United Nations Standing Committee on*

rights-based approach requires that states take action to support parents in protecting their children's health and wellbeing.²⁵⁹ This includes creating a marketing environment that does not undermine parents' attempts to guide their children's eating habits.²⁶⁰ A rights-based approach also implies that protecting children's health trumps concerns about the negative impact of advertising bans on broadcasters' revenues, which was a key issue in the ACMA's review of the CTS 2005.²⁶¹ This approach is more favourable to the protection of children than a risk-based approach that weighs up the likely costs and benefits of interventions and attempts to minimise the risk of harm and maximise benefits.²⁶² As such, human rights discourses provide a powerful justification for state intervention in food advertising to children.

Harm to wider society

Popular and political discourse more often frames obesity as a problem of individual choice and individual consequences.²⁶³ In the neo-liberal era public health laws can be seen as paternalistic and infringing individual liberties.²⁶⁴ This is in contrast to tobacco, where governments justified advertising restrictions on the basis of second-hand smoke's harm to third parties, including to children.²⁶⁵ However, public health researchers point to emerging research on the addictiveness of processed foods and sugary beverages, which justifies the application of a tobacco control model to these products.²⁶⁶ Researchers also conceptualise obesity as causing harms to wider society through the economic, social and health costs

Nutrition (15 March 2006) <<http://www.unscn.org/en/statements/>>. See also Swinburn et al, 'The "Sydney Principles" for Reducing the Commercial Promotion of Foods and Beverages to Children,' above n 169, 882.

²⁵⁹ Ingleby, Prossner and Waters, above n 255, 55-46.

²⁶⁰ Ibid; Swinburn et al, 'The "Sydney Principles" for Reducing the Commercial Promotion of Foods and Beverages to Children,' above n 169. See also Nuffield Council on Bioethics, above n, 250, 86.

²⁶¹ Ingleby, Prossner and Waters, above n 255, 55.

²⁶² World Health Organisation, 'Marketing of Foods High in Fat, Salt and Sugar to Children: Update 2012-2013', above n 83, 9.

²⁶³ Catriona Bonfiglioli et al, 'Choice and Voice: Obesity Debates in Television News ' (2007) 187(8) *Medical Journal of Australia* 44; Julia Henderson et al, 'Governing Childhood Obesity: Framing Regulation of Fast-Food Advertising in the Australian Print Media' (2009) 69(9) *Social Science & Medicine* 1402.

²⁶⁴ Karen Jochelson, 'Nanny or Steward? The Role of Government in Public Health' (2006) 120(12) *Public Health* 1149; LO Gostin and KG Gostin, 'A Broader Liberty: J S Mill, Paternalism and the Public's Health' (2009) 123(3) *Public Health* 214.

²⁶⁵ See, e.g., David A Kessler et al, 'The Food and Drug Administration's Regulation of Tobacco Products' (1996) 335(13) *The New England Journal of Medicine* 988.

²⁶⁶ A Gearhard, 'Food Addiction: An Examination of the Diagnostic Criteria for Dependence' (2009) 3(1) *Journal of Addiction Medicine* 1; Robert H Lustig, Laura A Schmidt and Claire D Brindis, 'Public Health: The Toxic Truth about Sugar' (2012) 482(7383) *Nature* 27. See also Michael Moss, 'The Extraordinary Science of Addictive Junk Food', *The New York Times* (online) 20 February 2013 <http://www.nytimes.com/2013/02/24/magazine/the-extraordinary-science-of-junk-food.html?pagewanted=all&_r=0>.

associated with metabolic syndrome and chronic disease.²⁶⁷ Thus, obesity can be thought of as an example of market failure.²⁶⁸ It is a 'negative externality', where the food industry externalises the costs of producing unhealthy food products onto wider society.²⁶⁹ This challenges the conception of obesity as an individual problem, and provides grounds for making food companies take responsibility for the true costs associated with production and consumption of unhealthy foods and beverages.²⁷⁰ These costs include the burden on the healthcare system from obesity-related illnesses, as well as decreased productivity and individuals' loss of social functioning and wellbeing.

The failure of self-regulation

The current body of evidence does not demonstrate that voluntary initiatives by the Australian food industry have moderated the nature or volume of food advertising directed to children.²⁷¹ Signatory and non-signatory companies continue to advertise unhealthy products during children's programs and peak viewing times.²⁷² There are also significant flaws in the design and implementation of the self-regulatory system. The codes contain narrow and vague terms, meaning that they exclude many advertising techniques and media channels used to promote food to children.²⁷³ Additionally, they only apply to a narrow range of food and beverage products, permitting companies to advertise a variety of unhealthy products to children.²⁷⁴ Most importantly, the initiatives only apply to advertising that is 'directed primarily to children'. As a result, they do not reduce children's exposure to unhealthy food

²⁶⁷ Lustig, Schmidt and Brindis, above n 266, 28.

²⁶⁸ Kathleen Seiders and Ross D Petty, 'Obesity and the Role of Food Marketing: A Policy Analysis of Issues and Remedies' (2004) 23(2) *Journal of Public Policy and Marketing* 153; Bebe Loff and Brad R Crammond, 'Wanted: Politicians to Champion Health (Not Obesity)' (2010) 192(7) *Medical Journal of Australia* 397.

²⁶⁹ Lustig, Schmidt and Brindis, above n 266; Frank Chaloupka, 'Public Policy versus Individual Rights and Responsibility: An Economist's Perspective' (2011) 8(5) *Preventing Chronic Disease* 1, 2.

²⁷⁰ Lustig, Schmidt and Brindis, above n 266. See also Nuffield Council on Bioethics, above n 250, xvii.

²⁷¹ Lisa G Smithers, John W Lynch and Tracy Merlin, 'Television Marketing of Unhealthy Food and Beverages to Children in Australia: A Review of Published Evidence from 2009' (Australian National Preventive Health Agency, October 2012) 3 <<http://www.anpha.gov.au/internet/anpha/publishing.nsf/Content/publications>>.

²⁷² Ibid 32. See also Kelly et al, 'Trends in Food Advertising to Children on Free-to-Air Television in Australia', above n 55; Lana Hebden, et al, 'Advertising of Fast-Food to Children on Australian Television: The Impact of Industry Self-Regulation' (2011) 195(1) *Medical Journal of Australia* 20; Lesley King et al, 'Building the Case for Independent Monitoring of Food Advertising on Australian Television' (2012) (*FirstView Article*) *Public Health Nutrition* 1 <<http://journals.cambridge.org/action/displayAbstract?fromPage=online&aid=8706977>>.

²⁷³ Lumley, Martin and Antonopoulos, above n 67, 12-13; Lana Hebden et al, 'Industry Self-regulation of Food Marketing to Children: Reading the Fine Print' (2010) 21(3) *Health Promotion Journal of Australia* 229; L Wallard et al, 'The Takeaway on Fast-Food Meals: A Summary of Three Fast-Food Studies in Australia' (Cancer Council NSW, 2012) <<http://www.cancerCouncil.com.au/68145/news-media/latest-news-news-media/cc-news/fast-food-exposing-the-truth/?pp=68145>>.

²⁷⁴ Wallard et al, above n 273, 5; Lana Hebden et al, 'Regulating the Types of Foods and Beverages Marketed to Australian Children: How Useful are Food Industry Commitments?' (2010) 67(4) *Nutrition & Dietetics* 258, 265.

advertising designed for a general viewing audience and screened in times that are popular with both adults and children.²⁷⁵ Administration, monitoring and enforcement processes also lack transparency and accountability, diminishing the initiatives' credibility with the wider community.²⁷⁶ While industry monitoring demonstrates high levels of compliance with the initiatives,²⁷⁷ studies show numerous breaches of the codes, suggesting that the industry's findings are inaccurate.²⁷⁸ However, as there are no penalties for non-compliance, companies have few incentives to improve their advertising practices.²⁷⁹

Researchers draw similar conclusions about food advertising self-regulation in other jurisdictions.²⁸⁰ For example, although the US CFBAI has had some positive impact on the nutritional quality of foods advertised to children,²⁸¹ the vast majority of food promotion is still for unhealthy products.²⁸² And despite expansions to the code's coverage of different advertising platforms, it still excludes product packaging and in-store promotion, as well as some forms of in-school marketing.²⁸³ Overall, there is little to no evidence that food industry self-regulation is effective.²⁸⁴ Corinne Hawkes argues that food advertising self-regulation is fundamentally limited as an obesity prevention measure because it only controls the content of advertising, i.e. it prohibits advertising that is misleading, deceptive, exploitive or explicitly encourages excess consumption.²⁸⁵ However, it cannot reduce the large volume of food advertising that children are exposed to across all media, which is the crux of the problem for public health researchers.²⁸⁶ Further, the food industry has a strong economic incentive to sell highly processed food and sugary beverages, but little reason to forgo

²⁷⁵ Lumley, Martin and Antonopoulos, above n 67, 11-12.

²⁷⁶ Reeve, above n 207.

²⁷⁷ See, e.g., Australian Food and Grocery Council, *Responsible Children's Marketing Initiative 2011 Compliance Report* (2011) <<http://www.afgc.org.au/industry-codes/advertising-to-children/rcmi/rcmi-reports-2009.html>>.

²⁷⁸ Michele Roberts et al, 'Compliance with Children's Television Food Advertising Regulations in Australia' (2012) 12(1) *BMC Public Health* 846.

²⁷⁹ Lumley, Martin and Antonopoulos, above n 67, 18; Reeve, above n 207.

²⁸⁰ See, e.g., Dale Kunkel, Christopher McKinley and Paul Wright, 'The Impact of Industry Self-Regulation on the Nutritional Quality of Foods Advertised on Television to Children' (Children Now, December 2009) <http://www.childrennow.org/index.php/learn/advertising_obesity>; Vivica I Kraak et al, 'Industry Progress to Market a Healthful Diet to American Children and Adolescents' (2011) 41(3) *American Journal of Preventive Medicine* 322; Monique Potvin Kent, Lise Dubois and Alissa Wanless, 'Self-Regulation by Industry of Food Marketing is Having Little Impact During Children's Preferred Television' (2011) 6(5-6) *International Journal of Paediatric Obesity* 401.

²⁸¹ Leibowitz et al, above n 53, 8.

²⁸² Ibid; Kraak et al, above n 280.

²⁸³ Leibowitz et al, above n 53, ES-13.

²⁸⁴ See, e.g., Stuckler and Nestle, above n 48, 2; Moodie et al, above n 51, 675; Wallard et al, above n 273; Kraak et al, above n 280.

²⁸⁵ C Hawkes, 'Self-Regulation of Food Advertising: What it Can, Could and Cannot Do To Discourage Unhealthy Eating Habits Among Children' (2005) 30(4) *Nutrition Bulletin* 374, 380.

²⁸⁶ Ibid.

revenues generated from their sales, creating a fundamental conflict between the industry's profit and obesity prevention.²⁸⁷ Thus, self-regulation constitutes another example of market failure in relation to obesity, providing a strong argument for government regulation of unhealthy food promotion.²⁸⁸

Advertising restrictions are highly cost-effective

Research suggests that legislative restrictions on food advertising would be highly cost-effective.²⁸⁹ Further, regulation could be designed that reduced the volume of unhealthy food advertising during children's peak viewing times, with little effect on healthy food advertising.²⁹⁰ One Australian study evaluated the cost-effectiveness of extending regulation to remove most food and beverage advertising during children's peaking viewing times.²⁹¹ The study measured benefits according to the cost per body mass index unit saved and as the cost per disability-adjusted life year saved.²⁹² The costs of intervention were measured in terms of the stricter monitoring and enforcement of extended regulation, while cost offsets were assessed to be future health sector costs saved (which were deducted from the cost of the intervention to determine its net cost).²⁹³ The study found that the intervention would result in a small BMI change per child, but a large total health benefit because of the large number of children affected and the fact that it was low cost.²⁹⁴ It concluded that the intervention was highly cost effective, even when considering the potential lost sales of food manufacturers.²⁹⁵ In fact, advertising restrictions were one of the most cost-effective measures commonly considered as part of government obesity prevention programs.²⁹⁶

²⁸⁷ Chapter 9 discusses this point in some depth. See, e.g., Gilmore, Savell and Collin, above n 52; David S Ludwig and Marion Nestle, 'Can the Food Industry Play a Constructive Role in the Obesity Epidemic?' (2008) 300(15) *Journal of the American Medical Association* 1808, 1809.

²⁸⁸ See, e.g., Stuckler and Nestle, above n 48; Moodie et al, above n 51, 676; MacKay et al, above n 39; Wallard et al, above n 273.

²⁸⁹ MM Haby et al, 'A New Approach to Assessing the Health Benefits From Obesity Interventions in Children and Adolescents: The Assessing Cost-Effectiveness in Obesity Project' (2006) 30(10) *International Journal of Obesity* 1463; A Magnus et al, 'The Cost-Effectiveness of Removing Television Advertising of High-Fat and/or High-Sugar Food and Beverages to Australian Children' (2009) 33(10) *International Journal of Obesity* 1094

²⁹⁰ Bridget Kelly et al, 'The Effects of Different Regulation Systems on Television Food Advertising to Children' (2007) 31(4) *Australian and New Zealand Journal of Public Health* 340.

²⁹¹ Magnus et al, above n 289.

²⁹² Ibid 1095.

²⁹³ Ibid 1097.

²⁹⁴ Ibid 1098.

²⁹⁵ Ibid 1099. See also Haby et al, above n 289.

²⁹⁶ Haby et al, above n 289.

Public support for regulating food advertising to children

Any proposed legislation would be subject to political scrutiny, which would involve considering community approval of advertising restrictions.²⁹⁷ However, there appears to be significant public support for strengthening government restrictions on unhealthy food advertising.²⁹⁸ A 2007 survey of 400 Australian parents found widespread concern about unhealthy food advertising to children (67.3 per cent), including the use of toys (76.4 per cent) and popular personalities (67.7 per cent), as well as the large volume of advertising that children were exposed to (79.7 per cent).²⁹⁹ Almost all parents (92.8 per cent) supported stronger government restrictions on food advertising during children's peak television viewing times, with high levels of support for a ban on unhealthy food advertising during these times (86.6 per cent).³⁰⁰ A more recent survey found that the majority of participants (83 per cent) were in favour of restrictions on televised food advertising, particularly in the mornings between 6am and 9am, and the evenings between 4pm and 9.30pm (43 per cent).³⁰¹ Participants supported restrictions on other forms of food promotion, including direct marketing to children via text message and email, sports sponsorship, and the use of toys, giveaways and packaging designed to appeal to children.³⁰² Overall, research suggests high levels of public acceptability for policy interventions that aim to create a healthier food environment, including statutory regulation of food advertising.³⁰³

8. Conclusion

There are strong arguments for statutory regulation of unhealthy food advertising to children. However, the Federal government appears reluctant to regulate and instead supports voluntary industry initiatives. Chapter 11 describes the political and practical barriers to legislative restrictions on food advertising, including vigorous industry opposition and political ideologies that favour de-regulation and a free market economy. Thus, while it is widely accepted that food companies should limit food advertising directed to children, there

²⁹⁷ Wilde, above n 184, 158; Alexandra Chung et al, 'An Analysis of Potential Barriers and Enablers to Regulating the Television Marketing of Unhealthy Foods to Children at the State Government Level in Australia' (2012) 12(1) *BMC Public Health* 1123, 1128.

²⁹⁸ See, e.g., Belinda Morley et al, 'Public Opinion on Food-Related Obesity Prevention Policy Initiatives' (2012) 23(2) *Health Promotion Journal of Australia* 86; Belinda Morley et al, 'Parental Awareness and Attitudes about Food Advertising to Children on Australian Television' (2008) 32(4) *Australian and New Zealand Journal of Public Health* 341.

²⁹⁹ Morley et al, 'Parental Awareness and Attitudes about Food Advertising to Children', above n 298.

³⁰⁰ *Ibid* 344.

³⁰¹ Morley et al, 'Public Opinion on Food-Related Obesity Prevention Policy Initiatives', above n 298, 88.

³⁰² *Ibid* 89.

³⁰³ *Ibid*.

is considerable debate on the scope of restrictions, what regulatory instruments should be used, and whether they should be implemented by government or industry. Within the context of this debate, this thesis evaluates the current self-regulatory regime for food advertising to children in Australia. I also examine ways in which states can strengthen voluntary forms of food regulation, without resorting to statutory measures in the first instance. In particular, I consider the incremental or staged introduction of different forms of government intervention and oversight. I refer to this as a ‘responsive’ regulatory approach, following the terminology used by the National Preventative Health Taskforce, and in literature from regulatory theory. As a first step in assessing food industry self-regulation, the next chapter describes the regulation of food, alcohol and tobacco advertising in Australia. Chapter 3 draws together literature from public health ethics and regulatory theory in order to provide a principled basis for state intervention into food advertising regulation. This chapter lays the foundation for designing an effective regulatory system that includes voluntary action by the food industry.

CHAPTER TWO

Regulation of tobacco, alcohol and food advertising in Australia

This chapter introduces the regulatory regime governing tobacco, alcohol and food advertising in Australia, with a particular focus on advertising directed to children. The chapter is ordered by moving from discussion of the strongest and most restrictive forms of regulation to the weakest and most permissive. First, I describe legislative restrictions on advertising, including consumer protection laws, tobacco control legislation and state-level food laws. Second, I outline the co-regulatory scheme established by the *Broadcasting Services Act 1992* (Cth) for television and radio advertising. Third, I discuss the self-regulatory system created by the Australian Association of National Advertisers (AANA). Last, I describe a series of product-specific codes created by industry representative bodies. These codes include the RCMI and QSRI and the *Alcohol Beverages Advertising (and Packaging) Code* (ABAC), which are the main focus of this thesis. I also describe the arrangements for administering and enforcing each form of regulation. Tables 3 and 4 below summarise the regulatory arrangements for food and alcohol advertising in Australia.

This chapter only covers a small part of marketing law and regulation. I focus on promotion separately from other elements of the 'marketing mix', i.e. product creation, price and location.¹ I consider advertising as being distinct from other marketing tools, such as personal selling, public relations, and direct marketing.² However, there are overlaps between the regulatory systems that apply to each form of commercial communication. Accordingly, I touch on controls on other forms of marketing, including sponsorship, product labelling and packaging. I describe regulation of a range of communication channels, but focus most closely on television advertising. Because of its influence and capacity to reach a broad audience, this is the most heavily regulated medium,³ as well as the most studied in research on food advertising.⁴

¹ William Wells et al, *Advertising: Principles and Practices* (Pearson Australia, 2nd ed, 2011) 49.

² Ibid 52-55. See also Jef I Richards and Catharine M Curran, 'Oracles on "Advertising": Searching for a Definition' (2002) 31(2) *Journal of Advertising* 63.

³ David Rolph, Matt Vitins and Judith Bannister, *Media Law: Cases, Materials and Commentary* (Oxford University Press, 2010) 70.

⁴ Kathy Chapman, Bridget P Kelley and Lesley A King, 'Using a Research Framework to Identify Knowledge Gaps in Research on Food Marketing to Children in Australia' (2009) 33(3) *Australian and New Zealand Journal of Public Health* 253.

Table 3. A summary of food advertising regulation

Communication channel	Instrument	Form of regulation	Key requirements
All media and marketing	Australian Consumer Law	Legislation	Food advertising must not be misleading, deceptive or untruthful.
All advertising and marketing	State Food Acts	Legislation	Food advertising, packaging and promotion must not be misleading, deceptive or untruthful.
All advertising	State Food Acts	Standards	Provides for the substantiation and approval of health and nutrition claims made in food advertising and labelling. Some states' legislation requires that energy content information be provided on menu boards and package labelling in fast-food restaurant outlets.
Free-to-air television	<i>Children's Television Standards 2009</i>	Standards	Regulates the scheduling, volume and content of advertising to children during C periods (a period when licensees screen programs classified as suitable for children). Restricts the use of persuasive techniques in advertising to children, including premium offers, undue pressure, prizes and popular characters. Food advertising must not contain any misleading or deceptive information about the nutritional quality of the product.
Free-to-air television	<i>2010 Commercial Television Industry Code of Practice</i>	Co-regulation	Advertising directed to children must not encourage or promote an inactive lifestyle, or unhealthy eating or drinking habits. Prohibits advertising to children that contains misleading or incorrect nutritional information about food products. Regulates the use of program hosts and characters in promotions to children, and references to sponsorship arrangements and prizes. Extends CTS 30-34 to advertising to children outside of C and P periods.
All media (excludes product labels, packaging, public relations, program promotions)	<i>AANA Code of Ethics</i>	Self-regulation	Regulates taste and decency in advertising, including discrimination, sexual appeal, violence, sex, sexuality and nudity, strong or obscene language and health and safety.
All media (excludes product packaging and labelling)	<i>AANA Code for Marketing and Advertising Communications to Children</i>	Self-regulation	Advertising must not promote inactive lifestyles or unhealthy eating and drinking habits. Prohibits advertising that draws upon pester power, and regulates the use of popular personalities and premiums.
All media (excludes product packaging and labelling)	<i>AANA Food and Beverages: Advertising and Marketing Communications Code</i>	Self-regulation	Prohibits advertising that undermines parental authority, draws upon pester power, creates a misleading sense of urgency, undermines the importance of healthy/active lifestyles and balanced diets, or which encourages excess consumption. Regulates the presentation of premium offers.
Television, radio, print, cinema, third-party internet sites (where audience is predominantly children and/or directed primarily to children).	<i>Responsible Children's Marketing Initiative</i>	Self-regulation	Advertising to children must be for 'healthy dietary choices' and promote a healthy lifestyle in advertising messaging. Regulates the use of popular and licensed personalities/characters, product placement including in interactive games, advertising in schools and premium offers.
Television, radio, newspapers, magazines, outdoor advertising, emails, interactive games, cinema and internet sites.	<i>Quick Service Restaurant Industry Initiative for Responsible Advertising and Marketing to Children</i>	Self-regulation	Advertising to children must be for 'healthier choices' and/or represent a healthy lifestyle in advertising messaging. Regulates the use of licensed personalities/characters, product placement including in interactive games, advertising in schools and premium offers.

Table 4. A summary of alcohol advertising regulation

Communication channel	Instrument	Form of regulation	Key requirements
All media and marketing	Australian Consumer Law	Legislation	Alcohol advertising must not be misleading, deceptive or untruthful.
Free-to-air television	<i>Children's Television Standards 2009</i>	Standards	Alcohol advertisements must not be broadcast during C periods. Advertisements and sponsorship announcements broadcasting during C periods must not identify/refer to companies, persons or organisations whose principal activity is the manufacture, distribution and sale of alcoholic drinks.
Free-to-air television	<i>2010 Commercial Television Industry Code of Practice</i>	Co-regulation	Alcohol advertisements may only be broadcast in M, MA or AV classification periods (i.e. between 12-3pm on school days and 8.30pm-5am on any day). Creates an exception for advertisements that accompany the live broadcast of sports events on weekends and public holidays. Advertising to children must not be for, or relate in any way to alcohol products, or draw any association with companies that supply alcohol products.
All media	<i>Alcohol Beverages Advertising (and Packaging) Code</i>	Quasi-regulation	Prohibits advertising that encourages irresponsible or excess consumption, underage drinking or has 'strong and evident appeal' to children. Also prohibits advertising that shows a connection between alcohol consumption and a change in mood and environment, social success, hazardous activities or the operation of motor vehicles.
All media (excludes product labels, packaging, public relations, program promotions)	<i>AANA Code of Ethics</i>	Self-regulation	Regulates taste and decency in advertising, including discrimination, sexual appeal, violence, sex, sexuality and nudity, strong or obscene language and health and safety.
All media (excludes product packaging and labelling)	<i>AANA Code for Marketing and Advertising Communications to Children</i>	Self-regulation	Advertising to children must not be for, or relate in any way to alcohol products, or draw any association with companies that supply alcohol products.
Outdoor and billboard advertising	Outdoor Media Association's <i>Alcohol Advertising Guidelines</i>	Self-regulation	Prohibits alcohol advertising on fixed signs within a 150 metre sight-line of primary schools. Members must only accept alcohol advertising that has been pre-vetted.

1. Legislative restrictions on advertising

The Australian Consumer Protection Law

The *Competition and Consumer Act 2010* (Cth) contains the Australian Consumer Law (ACL).⁵ The ACL is a single national law that is applied in each jurisdiction by state and territory Fair Trading Acts.⁶ Section 18(1) of the ACL contains a general prohibition on false and misleading conduct in trade or commerce, including misleading and deceptive statements.⁷ Section 29 prohibits false and misleading claims and representations about the supply of goods or services, and claims and representations made in the course of promoting the supply/use of goods or services.⁸ The Act restricts misleading marketing and promotion, including misleading and deceptive representations of food in advertising.⁹ However, it applies to all misleading and deceptive conduct in relation to the manufacture and promotion of food and alcohol, including the provision of product information, packaging and labelling.¹⁰ The Australian Competition and Consumer Commission (ACCC) administers and enforces the ACL,¹¹ including by identifying and removing misleading advertising.¹² It possesses a wide range of enforcement options, including court-ordered injunctions,¹³ corrective advertising,¹⁴ community service and probation orders,¹⁵ and enforceable undertakings.¹⁶ State and territory Fair Trading Acts establish consumer protection agencies that administer and enforce consumer protection legislation in each state.¹⁷

⁵ See *Competition and Consumer Act 2010* (Cth) sch 2.

⁶ *Competition and Consumer Act 2010* (Cth) pt XI AA. See, e.g., *Fair Trading Act 1987* (NSW) s28.

⁷ *Competition and Consumer Act 2010* (Cth) sch 2 s 18.

⁸ *Ibid* s 29.

⁹ LexisNexus, Halsbury's Laws of Australia (at 2 May 2011) 100 Consumer Protection, 'Misleading Conduct' [100-120]. See also Free TV Commercials Advice, *Classification Handbook: An Overview of Classification Procedures Incorporating the A-Z Television Production Checklist* (January 2010) 45-46 Commercials Advice Division <http://www.freetv.com.au/content_common/pg-cad-procedures-guide.seo>.

¹⁰ *Ibid*.

¹¹ *Competition and Consumer Act 2010* (Cth) pt 2.

¹² Wells et al, above n 1, 77.

¹³ *Competition and Consumer Act 2010* (Cth) sch 2 s 232.

¹⁴ *Ibid* sch 2 s 246(2)(b).

¹⁵ *Ibid* sch 2 s 246.

¹⁶ *Ibid* sch 2 s 218.

¹⁷ See, e.g., *Fair Trading Act 1987* (NSW) pt 2; Australian Competition and Consumer Commission, 'Advertising and Selling' (Commonwealth of Australia, January 2011) 1 <<http://transition.accc.gov.au/content/index.phtml/itemId/303213>>; NSW Government, *Fair Trading* (2 April 2013) <<http://www.fairtrading.nsw.gov.au/default.html>>.

Tobacco control legislation

Tobacco advertising is regulated by statute because of the product's harmfulness.¹⁸ The *Tobacco Advertising Prohibition Act 1992* (Cth) provides a comprehensive set of national controls on advertising in print and electronic media, outdoor advertising and tobacco sponsorship.¹⁹ It permits state and territory governments to pass legislation regulating forms of advertising that are permitted at a federal level, consistently with the Act.²⁰ State legislation prohibits point-of-sale advertising and places stringent controls on the location, size and format of retail displays of tobacco products, as well as banning the display of cartons and limiting the number of packets displayed.²¹ In March 2012 the Federal government enacted legislation restricting tobacco advertising on the internet and via other electronic media.²² After a constitutional challenge by the tobacco industry,²³ it also introduced the *Tobacco Plain Packaging Act 2011* (Cth).²⁴ The Act requires that all tobacco products be sold in drab brown packaging with a matt finish and prominent health warnings, with no graphic trademarks or other embellishments.²⁵ Thus, tobacco promotion is comprehensively covered by both state and federal controls, with a federally-based legislative framework covering gaps in state-based regulation.²⁶

¹⁸ Legislative restrictions also apply to advertising for gambling and lotteries, electoral advertising, advertising that contains immoral, obscene or indecent content, as well as advertising for other harmful goods. Shenagh Barnes and Michael Blakeney, *Advertising Regulation* (Lawbook, 1982) 70. See, e.g., the *Therapeutic Goods Act 1989* (Cth) and Therapeutic Goods Administration, *Therapeutic Goods Advertising Code 2007* (at 11 July 2013).

¹⁹ Christopher Reynolds, *Public Health and Environmental Health Law* (Federation Press, 2011) 273. The Act permits point-of-sale advertising so long as state legislation regulates its display or it complies with provisions of the Act. It also allows for the transmission of advertisements as an 'accidental or incidental' accompaniment to other broadcasts or publications. See *Tobacco Advertising Prohibition Act 1992* (Cth) ss 14, 16(1), 19.

²⁰ *Tobacco Advertising Prohibition Act 1992* (Cth) s 6. For relevant state and territory legislation, see, e.g., *Public Health (Tobacco) Act 2008* (NSW).

²¹ See, e.g., *Public Health (Tobacco) Regulation 2009* (NSW).

²² *Tobacco Advertising Prohibition Amendment Act 2012* (Cth) ss 2, 16A, 16B. See also Department of Health and Ageing, *Guide to Internet Point-of-Sale Tobacco Advertising* (December 2012) Australian Government <<http://www.health.gov.au/internet/main/publishing.nsf/Content/gipos-tob-adv>>.

²³ See *JT International SA v Commonwealth; British American Tobacco Australia Ltd and Others v Commonwealth* [2012] HCA 43.

²⁴ The Act is accompanied by the *Tobacco Plain Packaging Regulations 2011* (Cth) which specify requirements for the presentation of retail packaging, including its physical features (pt 2 div 2.1.), colour and finish (pt 2 div 2.2.), trademarks (pt 2 div 2.3) and brand, business, company and variant names (pt 2 div 2.4), as well as the appearance of tobacco products (pt 3).

²⁵ Andrew D Mitchell and David M Studdert, 'Plain Packaging of Tobacco Products in Australia: A Novel Regulation Faces Legal Challenge' (2012) 307(3) *Journal of the American Medical Association* 261. See *Tobacco Plain Packaging Act 2011* (Cth) pt 2.

²⁶ Reynolds, above n 19, 87.

Food laws

Food advertising is subject to regulatory requirements found in the *Australia and New Zealand Food Standards Code* (the 'Food Standards Code') and state-level Food Acts.²⁷ The *Food Standards Australia New Zealand Act 1991* (Cth) establishes Food Standards Australia New Zealand (FSANZ) as an independent statutory authority.²⁸ FSANZ creates standards on hygiene and safe food preparation, labelling and ingredients based on scientific and technical criteria, and in accordance with food and nutrition policy.²⁹ Together, these standards constitute the *Food Standards Code*.³⁰ Each state and territory automatically adopts the Code in state legislation,³¹ and central and local government agencies share responsibility for administering and enforcing these laws.³² State Food Acts contain provisions prohibiting false and misleading descriptions of food in advertising,³³ as well as advertising that contravenes the *Food Standards Code*.³⁴ Recently, NSW and South Australia amended their food acts to require that chain food outlets display the kilojoule content of standard food items on menu boards and identifying tags or labels on products.³⁵ Other state and territory governments (including Victoria and Tasmania) seem likely to introduce similar legislation.³⁶

The *Food Standards Code* itself contains a number of standards that are relevant to food advertising.³⁷ For example, labels and advertisements must not claim therapeutic or

²⁷ See Food Standards Australia New Zealand, *Australia New Zealand Food Standards Code* (at 11 July 2013); Neal Blewett et al, 'Labelling Logic: Review of Food Labelling Law and Policy' (Australian Government, 2011) 23 <<http://www.foodlabellingreview.gov.au/internet/foodlabelling/publishing.nsf/content/labelling-logic>>.

²⁸ See *Food Standards Australia New Zealand Act 1991* (Cth) s 21; Reynolds, above n 19, 324; Food Regulation Secretariat, *The Food Regulation System* (23 January 2009) Department of Health and Ageing <<http://www.health.gov.au/internet/main/publishing.nsf/Content/foodsecretariat-system1.htm>>.

²⁹ Australian Institute of Health and Welfare, 'Australia's Food & Nutrition'. Cat No PHE 163 (AIHW, 2012) 45 <<http://www.aihw.gov.au/publication-detail/?id=10737422319>>.

³⁰ Food Standards Australia New Zealand, *Australia New Zealand Food Standards Code* (at 13 July 2013).

³¹ Council of Australian Governments, 'Food Regulation Agreement' (3 July 2008) pt IV <<http://www.coag.gov.au/node/272>>.

³² Reynolds, above n 19, 330. See, e.g., *Food Act 2003* (NSW) s 107, which establishes the NSW Food Authority. Section 111 of the Act envisages that local councils will act as enforcement agencies. See also NSW Food Authority, *Food Regulation Partnership* (30 November 2012) <<http://www.foodauthority.nsw.gov.au/industry/audits-inspections-compliance/localgovernment/>>.

³³ Free TV Commercials Advice, above n 9, 45-46. See, e.g., *Food Act 2003* (NSW) ss 18, 22.

³⁴ See, e.g., *Food Act 2003* (NSW) s 21.

³⁵ See *Food Act 2003* (NSW) s 106N; *Food Regulation 2010* (NSW) pt2B; *Food Act 2001* (SA) s 112; *Food Regulations 2002* (SA) reg 10A.

³⁶ S MacKay, 'Legislative Solutions to Unhealthy Eating and Obesity in Australia' (2011) 125(12) *Public Health* 896, 901.

³⁷ The *Food Standards Code* also regulates alcohol labelling, for example by requiring that alcohol products display information on the presence of allergens and mandatory warning and advisory statements (std 1.2.3). The recent Food Labelling Law and Policy review (the 'Food Labelling Review') recommended changes to the regulation of alcohol labelling, including the display of energy content and new warning messages about the

prophylactic qualities³⁸ or that the product induces weight loss.³⁹ Food advertisements must not contain material that would be prohibited on the label of the product under the provisions of the Code.⁴⁰ The Code restricts claims about the vitamin and mineral content of foods,⁴¹ but it does not regulate the use of descriptors such as ‘fresh,’ or ‘organic’.⁴²

Standard 1.2.7, which recently commenced operation after an extensive period of consultation, regulates the circumstances in which advertisements can refer to the nutritional content of food and in which health claims can be made about a food or properties of a food.⁴³ Advertising and labelling making nutrition claims (for example, ‘reduced salt’) must meet requirements for product composition.⁴⁴ Health claims must be based on food-health relationships that have been substantiated according to the Standard.⁴⁵ Foods carrying health claims must also meet nutritional requirements set out in the Nutrient Profiling Scoring Criterion,⁴⁶ which scores foods based on their total amount of energy, saturated fat, sugar and

health risks of alcohol use (see Blewett et al, above n 27, 97-83). However, the Federal government did not support these recommendations, with the exception of a mandatory warning of the risks of drinking while pregnant. The government granted the alcohol industry two years to pursue voluntary initiatives to introduce such warnings before it would consider action on the issue. See Legislative and Governance Forum on Food Regulation (convening as the Australia and New Zealand Food Regulation Ministerial Council), *Response to the Recommendations of Labelling Logic: Review of Food Labelling Law and Policy (2011)* (10 December 2011) 30 Review of Food Labelling Law and Policy

<<http://www.foodlabellingreview.gov.au/internet/foodlabelling/publishing.nsf/content/home>>.

³⁸ Food Standards Australia New Zealand, *Australia New Zealand Food Standards Code* (at 10 July 2013) std 1.2.7 cl 7.

³⁹ *Ibid* std s.2.7 cl 14.

⁴⁰ *Ibid* std 1.1.1 cl 13. See also std 1.2.7 cl 17-19, sch 1-3, which outlines the conditions under which claims about a relationship between vitamin/mineral and a health effect may be made.

⁴¹ *Ibid* std 1.3.2 cls 4-9; st 1.2.7 cl 8.

⁴² The Food Labelling Review recommended tighter regulation of claims relating to food production methods and processes (for example ‘organic’ or ‘halal’) through a combination of co- and self-regulation, including new values-based definitions and/or standards related to food production methods and processes in the *Food Standards Code* (see Blewett et al, above n 27, 104-106). The Federal government did not support amendments to the *Food Standards Code*, but endorsed self-regulation via industry codes of conduct. See Legislative and Governance Forum on Food Regulation, above n 37, 40-43.

⁴³ This replaces std 1.1A.2, although the latter remains in force concurrently with std 1.2.7 for three years, and companies may use either standard during that period. See also Food Standards Australia New Zealand, *Historical Development of Draft Standard 1.2.7 - Nutrition, Health and Related Claims* (January 2013) <<http://archive.foodstandards.gov.au/consumerinformation/nutritionhealthandrelatedclaims/healthclaimsstandar d5081.cfm>>.

⁴⁴ Food Standards Australia New Zealand, *Australia New Zealand Food Standards Code* (at 10 July 2013) std 1.2.7. cl 10.

⁴⁵ For general level health claims, businesses can use a pre-approved relationship contained in the standard or they may self-substantiate a relationship using scientific evidence (std 1.2.7 cl 17 (4)(b), 18). Higher-level health claims can only be based on food-health relationships pre-approved by FSANZ (std 1.2.7 cl 17(1)-(3)).

⁴⁶ *Ibid* std 1.2.7 cl 17(2).

sodium, as well as their content of certain food groups and in some cases, dietary fibre and protein.⁴⁷

2. Co-regulation under the *Broadcasting Services Act 1992* (Cth)

This section turns from direct, statutory regulation of tobacco, alcohol and food advertising to relevant co-regulatory schemes. In Australia, the *Broadcasting Services Act 1992* (Cth) sets out regulatory requirements for television and radio broadcasting services, as well as online content.⁴⁸ The Act requires commercial television and radio broadcasters to be licensed and specifies certain licensing conditions applicable to all broadcasters.⁴⁹ It charges the Australian Communications and Media Authority (ACMA) with monitoring the broadcasting industry and enforcing license conditions, and grants the ACMA a broad range of powers to perform this function.⁵⁰ The Act also outlines the principles and objectives informing the ACMA's regulatory role, including protecting children from harm; reflecting prevailing community standards; providing flexibility for licensees; and balancing public interest considerations against economic burdens on industry.⁵¹ In order to reduce unnecessary financial and economic costs to industry, the ACMA operates within a co-regulatory framework.⁵² Under these arrangements, broadcasting industry groups take responsibility for details of regulation in their own sector, through voluntary industry codes of practice.⁵³ However, the ACMA maintains oversight of broadcasting regulation, including the power to intervene where self-regulation fails.⁵⁴

The Children's Television Standards 2009

The *Broadcasting Services Act 1992* (Cth) empowers the ACMA to determine broadcasting standards where a code of practice does not appropriately address community concerns⁵⁵ or a

⁴⁷ Ibid std 1.2.7. cls 24,25, sch 5; see also Food Standards Australia New Zealand, *Nutrient Profiling and Nutrient Profiling Scoring Criterion (NPSC)* (January 2013) <<http://www.foodstandards.gov.au/consumerinformation/nutritionhealthandrelatedclaims/nutrientprofilingand5786.cfm>>.

⁴⁸ See Rolph, Vitins and Bannister, above n 3, 65.

⁴⁹ *Broadcasting Services Act 1992* (Cth) pt 4.

⁵⁰ Ibid s 5.

⁵¹ Ibid ss 3,4.

⁵² See Australian Communications and Media Authority, 'Optimal Conditions for Effective Self- and Co-Regulatory Arrangements' (Australian Government, June 2010) 5 <http://www.acma.gov.au/webwr/_assets/main/lib311886/self-_and_co-regulatory_arrangements.pdf>.

⁵³ Ibid. See *Broadcasting Services Act 1992* (Cth) s 123.

⁵⁴ Ibid. See *Broadcasting Services Act 1992* (Cth) s 125.

⁵⁵ *Broadcasting Services Act 1992* (Cth) s 125(1).

particular sector of the broadcasting industry is not covered by a code of practice.⁵⁶ The ACMA must also maintain existing standards for broadcast licensees, including those relating to children's programs,⁵⁷ i.e. the *Children's Television Standards 2009* (CTS 2009). The CTS 2009 provide for the creation of children's programming and oblige licensees to broadcast a certain amount of this programming per year. They also impose certain constraints on advertisements broadcast during designated children's viewing times.⁵⁸ Chapter 1 described the ACMA's review of the CTS 2005.⁵⁹ Although the ACMA decided not to restrict food and beverage advertising, it did restructure the CTS and strengthen some existing controls on advertising to children.⁶⁰ The new CTS are divided into three sections: Part 1 provides definitions of key terms; Part 2 sets out licensee's obligations to broadcast children's (C) and preschool (P) programs and other matters related to program scheduling, requirements and classification, while Part 3 sets out the provisions that protect children from harmful program and advertising material on television.⁶¹

The CTS 2009 apply immediately before, during and after designated 'C' and 'P' programs, which are those designed specifically for child audiences and classified as suitable for children's viewing by the ACMA.⁶² CTS defines 'children' as people younger than 14 years of age. C programs are broadcast during set periods (the 'C band') namely 7 to 8am Monday to Friday, 4 to 8.30 pm Monday to Friday and 7 am to 8.30 pm on the weekends and school holidays.⁶³ 'P' programs must be broadcast during the period 7 am to 4.30 pm Monday to Friday (the 'P band').⁶⁴ Licensees nominate a period within these bands in which to screen C programs (the 'C period') and P programs (the 'P period'). Licensees must broadcast at least 30 minutes of 'P' programs and 30 minutes of 'C' programs every weekday and at least 260 hours of 'C' programs per year.⁶⁵

⁵⁶ Ibid s 125(2).

⁵⁷ Ibid s 122.

⁵⁸ Australian Communications and Media Authority, 'Review of the Children's Television Standards 2005: Final Report of the Review' (Australian Government, August 2009) 1 <http://www.acma.gov.au/WEB/STANDARD/pc=PC_310262>.

⁵⁹ Ibid.

⁶⁰ Ibid 3.

⁶¹ Ibid.

⁶² 'C' programs must meet criteria contained in CTS 6 relating to production quality and suitability for Australian children. 'P' programs are those which are classified as suitable for viewing by pre-school children and which meet the same criteria. See Australian Communications and Media Authority, *Children's Television Standards 2009* (at 11 July 2013) CTS 5, 6.

⁶³ See Australian Communications and Media Authority, *Children's Television Standards 2009* (at 11 July 2013) CTS 5.

⁶⁴ Ibid CTS 5.

⁶⁵ Ibid CTS 8, 13, 14.

Part three of the CTS 2009 regulates the scheduling, volume and content of advertisements in C periods. CTS 26 prohibits advertising during P periods and restricts advertising during C periods to five minutes per 30 minutes of programming.⁶⁶ CTS 29 requires that during any 30 minutes of a C period, licensees may broadcast the same advertisement no more than twice.⁶⁷ The CTS restrict advertising content that is false, or misleading and deceptive to children. For example, CTS 32 concerns the clear and accurate presentation of advertised goods and services. It provides that an advertisement for a food product must not contain any misleading or incorrect information about the nutritional value of that product.⁶⁸ However, this is the only standard that deals specifically with food and beverage advertising. The CTS also regulate the use of some persuasive techniques commonly used in advertising to children, which are described in Table 5 below.

⁶⁶ Ibid CTS 26.

⁶⁷ Ibid CTS 29.

⁶⁸ Ibid CTS 32(7).

Table 5. Restrictions on persuasive techniques found in the CTS 2009

Technique	Standard	Requirements
Prizes	CTS 24	Presenters must not recommend or endorse prizes offered during C programs. The value of cash prizes may not be mentioned.
Pressure in advertisements	CTS 31	(1) Advertisements must not put undue pressure on children to ask their parents to purchase a product/service. (2) Advertisements must not state/imply that a product makes the owner superior to their peers, or that a person who buys a product for a child is more generous than a person who does not.
Disclaimers and premium offers	CTS 33	(2) Advertisements containing a premium offer must not make reference to the premium in a way that is more than merely incidental to the reference to the advertised product. (3) Matters relevant to whether a premium offer is merely incidental: amount of time devoted to the premium compared to that devoted to product; the way in which sound, pictures, text or moving images are used to promote the premium offer.
Promotions/endorsements by program characters	CTS 35	(1) Material broadcast during or immediately before or after C/P periods may not contain an endorsement, recommendation or promotion of a commercial product by a principle personality/character from a C/P program; popular program or movie character; popular cartoon, animated or computer generated character; popular personality; licensed or proprietary character.

The review of the CTS 2005 resulted in the ACMA strengthening provisions on pressure in advertisements, endorsements by program characters and premium offers. The review highlighted particular concern about the use of premium offers in food advertising to children.⁶⁹ Public health advocates called for bans on the use of premium offers in food advertising during C periods⁷⁰ or before 9pm.⁷¹ They also proposed that the CTS prohibit food and non-food items from being treated as a single product,⁷² as research showed that parents were concerned about food companies promoting free toys or other give-aways with

⁶⁹ Australian Communications and Media Authority, 'Review of the Children's Television Standards 2005: Final Report of the Review', above n 58, 13.

⁷⁰ See Choice, Submission to the Australian Communications and Media Authority, *Children's Television Standards Review*, August 2007, 13 <<http://www.acma.gov.au/Industry/Broadcast/Television/Childrens-TV/childrens-television-standards-review>>; Obesity Policy Coalition, Submission to Australian Communications and Media Authority, *Children's Television Standards Review*, August 2007, 74-75 <<http://www.acma.gov.au/Industry/Broadcast/Television/Childrens-TV/childrens-television-standards-review>>.

⁷¹ Rosemary Stanton, Submission to Australian Communications and Media Authority, *Children's Television Standards Review*, 30 August 2007, 6 <<http://www.acma.gov.au/Industry/Broadcast/Television/Childrens-TV/childrens-television-standards-review>>.

⁷² Ibid. See also Obesity Policy Coalition, above n 70, 75.

food products because it amplified children's pester power.⁷³ The ACMA declined to make these changes, although it clarified the provision to address criticisms that it was too ambiguous to ensure that children were not unduly influenced by premium offers. The current provision emphasises that in an advertisement for a food product, any reference to a non-food component must be 'merely incidental' to the food product advertised.⁷⁴ The ACMA also inserted into the provision a list of factors considered relevant to determining whether the reference to the premium offer is merely incidental.⁷⁵ However, CTS 33 continues to regulate how premiums are portrayed, rather than prohibiting their use altogether.⁷⁶

The CTS contains some specific requirements for alcohol advertising. CTS 36 prohibits advertising for alcoholic drinks during C periods, during C or P programs broadcast outside C periods, or in a break immediately before or after any C or P program.⁷⁷ Further, no advertisement or sponsorship announcement broadcast during a C period may identify or refer to a company, person, or organisation 'whose principal activity is the manufacture, distribution or sale of alcoholic drinks'.⁷⁸

Researchers have identified a number of limitations in the CTS, including that they contain only one standard relating specifically to food advertising.⁷⁹ They also have very limited coverage.⁸⁰ The standards examined here apply during C and P periods.⁸¹ However, television audience measurement data from 2006 shows that the most popular weekday viewing period for children aged five to 12 years is 6pm to 10pm, peaking at 7 to 8pm.⁸² Only part of this

⁷³ Ibid. See, e.g., Michele Roberts, 'Parenting in an Obesogenic Environment' (2005) 9 *Journal of Research for Consumers* 1.

⁷⁴ Australian Communications and Media Authority, 'Review of the Children's Television Standards 2005: Final Report of the Review', above n 58, 10. The relevant provision of the CTS 2005 said that where a premium was offered, reference to the premium had to be 'incidental' to the main product or service advertised (Australian Communications and Media Authority *Children's Television Standards 2005* (at 11 July 2013) CTS 20), rather than 'merely incidental' as per the current provision found in CTS 33(2) of the CTS 2009.

⁷⁵ Australian Communications and Media Authority, 'Review of the Children's Television Standards 2005: Final Report of the Review', above n 58, 10. See also Australian Communications and Media Authority *Children's Television Standards 2009* (at 11 July 2013) CTS 33(3).

⁷⁶ Heather Morton et al, 'Food Advertising and Broadcasting Legislation - A Case of System Failure?' (2005) 62(1) *Nutrition & Dietetics* 26, 27.

⁷⁷ Australian Communications and Media Authority *Children's Television Standards 2009* (at 11 July 2013) CTS 36.

⁷⁸ Ibid CTS 36(2).

⁷⁹ This is found in CTS 32(7), described above.

⁸⁰ Obesity Policy Coalition, above n 70, 31.

⁸¹ With the exception of CTS 24, which applies to C and P programs.

⁸² Lesley A King et al, 'Consultancy Report on Inappropriate Food Marketing to the National Preventative Taskforce' (Institute of Obesity, Nutrition and Exercise, The University of Sydney, 2009) 6 <<http://www.preventativehealth.org.au/internet/preventativehealth/publishing.nsf/Content/engagement-and-consultation-11p>>. See also Australian Communications and Media Authority, 'Children's Viewing Patterns on Commercial, Free-to-Air and Subscription Television' (Australian Government, May 2007)

viewing time falls within the C band, which runs from 4 to 8.30pm on weekdays.⁸³ Further, licensees nominate a 'C period' within the C band to show C programs. Consequently, the CTS only apply to the C period during which licensees broadcast C programs, rather than the times of day that constitute the C band.⁸⁴ Licensees do not have to make publicly available their schedule for children's viewing times, making it practically impossible for non-licensees to become aware of the time periods during which the CTS apply and whether licensees are compliant.⁸⁵

Further, research suggests that food advertisers routinely breach the Standards.⁸⁶ One 2012 study identified 619 breaches of the CTS 2009 during two months of television advertising on four main free-to-air channels in five large Australian cities.⁸⁷ In addition to their narrow application, these findings suggest that the CTS are widely ignored or circumvented even when they do apply. Thus, public health advocates call for more effective monitoring and enforcement of the standards by the ACMA (described further below).⁸⁸

Broadcasting industry codes of practice

The *Broadcasting Services Act 1992* (Cth) requires that broadcasting industry bodies create codes of practice in consultation with the ACMA.⁸⁹ Section 123 of the Act outlines content for the codes, including classification and broadcast of films, promoting accuracy in news and current affairs programs, and protecting children from harmful programming content.⁹⁰ Codes must also provide for a complaints handling mechanism, enabling public complaints about program content and compliance with the codes of practice.⁹¹ The ACMA registers a code of practice where it is satisfied that the code contains appropriate community

<http://www.acma.gov.au/webwr/_assets/main/lib310132/children_viewing_patterns_commercial_free-to-air_subscription_television.pdf>.

⁸³ See also Elizabeth Handsley et al, 'Regulatory Axes on Food Advertising to Children on Television' (2009) 6(1) *Australia and New Zealand Health Policy* 1, 3.

⁸⁴ See Australian Communications and Media Authority *Children's Television Standards 2009* (at 11 July 2013) CTS 5.

⁸⁵ Michele Roberts et al, 'Compliance with Children's Television Food Advertising Regulations in Australia' (2012) 12(1) *BMC Public Health* 846, 847. See also Elizabeth Handsley et al, 'Media, Public Health and Law: A Lawyer's Primer on the Food Advertising Debate' (2007) 12 *Media and Arts Law Review* 87 for a discussion of the complex and confusing nature of the CTS 2005.

⁸⁶ See, e.g., Morton et al, above n 76; Roberts et al, above n 85, Kathy Chapman, Penny Nicholas and Rajah Supramaniam, 'How Much Food Advertising is There On Australian Television?' (2006) 21(3) *Health Promotion International* 172; Bridget P Kelly and Josephine Y Chau, 'Children's Television Sub-Standards: A Call for Significant Amendments' (2007) 186(1) *Medical Journal of Australia* 18.

⁸⁷ Roberts et al, above n 85.

⁸⁸ *Ibid* 850.

⁸⁹ *Broadcasting Services Act 1992* (Cth) s 130(J).

⁹⁰ *Ibid* s 123(2).

⁹¹ *Ibid* s 123(2)(h).

safeguards, has the endorsement of most service providers in the relevant broadcasting category and the public have been given adequate opportunity to comment.⁹² Industry codes of conduct regulate commercial and community radio, ABC and SBS radio channels, subscription, narrowcast and open radio, commercial television, community television, subscription broadcast, and internet content and mobile services. They include the:

- *2010 Commercial Television Industry Code of Practice* (the ‘Free TV Code’);⁹³
- *Commercial Radio Codes of Practice*;⁹⁴ and
- Australian Subscription Television and Radio Association Codes of Practice for Subscription Broadcast Television, Subscription Narrowcast Television, Open Narrowcast Television and Subscription Narrowcast Radio.⁹⁵

Apart from the Free TV Code, this chapter does not deal with these codes as they contain few or no provisions that are relevant to food advertising to children.

The Free TV Code regulates the content of commercial television in accordance with current community standards.⁹⁶ The Code was created by the industry body representing commercial free-to-air television licensees (Free TV) and applies to all free-to-air television programming.⁹⁷ It sets out a system for classifying program material based on a series of viewing zones, which are established with reference to the majority audience normally viewing at the time.⁹⁸ Other provisions concern program promotions, accuracy in news and current affairs programs, time limits on non-program matter and complaints handling by licensees.⁹⁹ The Code also provides for the classification and placement of commercials.¹⁰⁰ Free TV Australia operates the Commercial Advice Division (CAD), which reviews advertising against a classification system set out in the Code. Where an advertisement meets

⁹² Ibid s 123(4).

⁹³ Free TV, *2010 Commercial Television Industry Code of Practice* (at 11 July, 2013).

⁹⁴ Commercial Radio Australia, *Commercial Radio Codes of Practice* (at 7 March 2013).

⁹⁵ Australian Subscription Television and Radio Association, *Astra Codes of Practice 2007: Subscription Broadcast Television Codes of Practice* (at 11 July 2013); Australian Subscription Television and Radio Association, *ASTRA Codes of Practice 2007: Subscription Narrowcast Television* (2007) (at 11 July 2013); Australian Subscription Television and Radio Association, *ASTRA Codes of Practice 2007: Subscription Narrowcast Radio* (at 11 July 2013); Australian Subscription Television and Radio Association, *ASTRA Codes of Practice 2009: Open Narrowcast Television* (at 11 July 2013).

⁹⁶ Free TV, *2010 Commercial Television Industry Code of Practice* (at 11 July, 2013) cl 1.1.1.

⁹⁷ Free TV Australia, *Welcome to Free TV* (2012) <<http://www.freetv.com.au/>>.

⁹⁸ Free TV, *2010 Commercial Television Industry Code of Practice* (at 11 July, 2013) cl 2.1.1.

⁹⁹ Ibid cls 5.1.4, 5.6, 5.9, s 7.

¹⁰⁰ Ibid s 6. See also Free TV Australia, Explanatory Note: Revised Commercial Television Industry Code of Practice Registered by the Australian Communications and Media Authority (2012) 2 <http://www.freetv.com.au/content_common/pg-code-of-practice-seo>.

regulatory requirements, CAD issues an identification number that indicates which classification zone it can be broadcast in.¹⁰¹ An advertisement's CAD number may be revoked in certain circumstances, for example where the ACMA or a court or tribunal decides that a commercial breaches relevant regulatory requirements.¹⁰²

The Free TV Code sets out restrictions on commercials 'directed to children'.¹⁰³ It defines 'children' as people younger than 14 years of age.¹⁰⁴ An advisory note to the Code lists the factors that licensees should consider when determining whether an advertisement is directed to children for the purposes of applying clause 6.23 of the Code (concerning commercials or community service announcements directed to children), including the nature of the product; the theme of the commercial; the story line and approach taken in selling the product or service; the visuals and language used in the commercial; the age of actors appearing in the commercial and its target audience.¹⁰⁵ Commercials directed to children must exercise 'special care and judgment' and comply with CTS 30-34.¹⁰⁶ Further, only advertisements that satisfy G classification criteria and meet the requirements of CTS 25, 30-34, and 35-36 may be shown during a C period or in breaks immediately before or after a C or P period.¹⁰⁷ The Code also contains requirements for advertising in programs 'directed to children', which are described in Box 1 below.

¹⁰¹ Free TV Commercials Advice, above n 9, 16.

¹⁰² Ibid 30-34, 45-46.

¹⁰³ Free TV, *2010 Commercial Television Industry Code of Practice* (at 11 July, 2013) cls 60.20-6.23.

¹⁰⁴ Ibid cl 6.20.1.

¹⁰⁵ Ibid 'Advisory Note, Commercials or Community Service Announcements Directed to Children', p 68.

¹⁰⁶ Ibid cl 6.20.

¹⁰⁷ Ibid cl 6.21.

Box 1. Free TV Code requirements for commercials directed to children

6.24 In any program directed mainly 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;

6.24.2 Products that have names or packaging featuring the host or any other regular presenter/character in the program must not be recommended or promoted within the program;

6.24.3 Material in the program that recommends/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 for them; and

6.24.4 References to prizes for competitions must be brief.

The Code contains few provisions specifically on food advertising directed to children.¹⁰⁸ It requires that advertisements directed to children for foods and beverages do not encourage or promote an inactive lifestyle or unhealthy eating or drinking habits.¹⁰⁹ An ‘inactive lifestyle’ is defined as ‘not engaging in any or much physical activity as a way of life’.¹¹⁰ ‘Unhealthy eating or drinking habits’ are defined as ‘excessive or compulsive consumption of food and/or beverages’.¹¹¹ In addition, food and beverage advertisements must not contain any misleading or incorrect information about the nutritional value of the product.¹¹² This provision mirrors CTS 32, but neither provision requires the full disclosure of nutritional information about food and beverage products.¹¹³ To the extent allowed by state food laws, this permits food companies to promote a product as being high in essential nutrients, while omitting the fact that it is also high in fat and sugar.¹¹⁴ As a result, advertisers can create the impression that a product is healthy (when in fact it is not), without providing any false nutrition information. A further limitation is that the Code does not regulate the number of food advertisements that can be shown or their placement on free-to-air television.¹¹⁵

¹⁰⁸ Ibid cl 6.23.

¹⁰⁹ Ibid cls 6.23.1, 6.23.2.

¹¹⁰ Ibid cl 6.23.4.

¹¹¹ Ibid cl 6.23.4.

¹¹² Ibid cl 6.23.3.

¹¹³ Handsley et al, 'Media, Public Health and Law: A Lawyer's Primer on the Food Advertising Debate,' above n 85, 99.

¹¹⁴ Ibid.

¹¹⁵ Morton et al, above n 76, 27.

The Code regulates commercials that are ‘direct advertisements for alcoholic drinks’.¹¹⁶ These are ‘a commercial broadcast by a licensee that draws the attention of the public, or a segment of it, to an alcoholic drink in a manner calculated to directly promote its purchase or use’.¹¹⁷ Advertising to children ‘must not be for, or relate in any way to, Alcohol Products or draw any association with companies that supply Alcohol Products’.¹¹⁸ Further, alcohol advertisements may only be broadcast in M, MA or MV classification periods.¹¹⁹ Accordingly, CAD classifies such advertisements as ‘L’ (Mature –Liquor/Alcoholic Drinks) and requires that they only be broadcast during 8.30pm to 5am on any day, and between 12 noon and 3pm on school days.¹²⁰

Alcohol advertising may be broadcast on weekends and public holidays as an accompaniment to the live broadcast of sporting events, or where the event is simulcast to a number of licence areas and a direct advertisement for alcohol is permitted in the area where the event is held.¹²¹ This is a significant loophole in the Code’s coverage, allowing alcohol manufactures to fill family viewing times with alcohol promotions.¹²² Chapter 6 also describes the failure of advertising regulatory instruments to reduce children’s exposure to unhealthy food and alcohol marketing as part of sponsorship arrangements. Accordingly, public health researchers advocate for new legislative controls on food and alcohol promotion produced through industry sponsorship of sports events, teams and clubs.¹²³

¹¹⁶ Free TV, *2010 Commercial Television Industry Code of Practice* (at 11 July, 2013) cl 6.7.

¹¹⁷ Ibid cl 6.10. The definition excludes sponsorship announcements on behalf of alcohol manufacturers, advertisements for restaurants, or for a company whose activities include the manufacture, distribution or sale of alcoholic drinks (cl 6.11). However, CAD’s classification guide says that the Code should be considered in relation to advertisements promoting pubs and clubs, food and wine festivals, and sports and entertainment events with alcohol sponsors. Free TV Commercials Advice, above n 9, 28.

¹¹⁸ Free TV, *2010 Commercial Television Industry Code of Practice* (at 11 July, 2013) cl 2.13.

¹¹⁹ Ibid cl 6.7.1.

¹²⁰ Free TV Commercials Advice, above n 9, 27.

¹²¹ Free TV, *2010 Commercial Television Industry Code of Practice* (at 11 July, 2013) cls 6.8-6.13.

¹²² Jill Sherriff and Mike Daube, ‘Cricket: Notching Up Runs for Food and Alcohol Companies?’ (2009) 34(1) *Australian and New Zealand Journal of Public Health* 19, 22; Standing Committee on Community Affairs, Parliament of Australia, *Alcohol Toll Reduction Bill 2007 [2008]* (June 2008) 16-18 <http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=s602>.

¹²³ Standing Committee on Community Affairs, above n 122, 23. See also Sandra C Jones, ‘When Does Alcohol Sponsorship of Sport Become Sports Sponsorship of Alcohol? A Case Study of Developments in Sport in Australia’ (2010) 11(3) *International Journal of Sports Marketing and Sponsorship* 250; Bridget Kelly et al, ‘Food and Drink Sponsorship of Children’s Sport in Australia: Who Pays?’ (2010) 26(2) *Health Promotion International* 188.

Enforcement of broadcast advertising regulation

The ACMA regulates advertising by requiring compliance with standards as part of broadcasters' license conditions. For example, the conditions of commercial broadcasting licences prohibit licensees from broadcasting tobacco advertisements.¹²⁴ Licensees must also 'seek to comply' with the Free TV Code,¹²⁵ although the Code sets out a series of conditions under which breaches will be excusable.¹²⁶ Members of the public complain (in writing) to licensees about broadcast advertising that breaches the Free TV Code. Licensees deal with complaints about the placement of commercials, but not the content of advertisements.¹²⁷ They also refer complaints about breaches of the CTS 30-36 to the ACMA.¹²⁸ Licensees should 'make every reasonable effort' to resolve complaints promptly¹²⁹ and must respond within 30 days of receipt.¹³⁰ If the complainant does not receive an adequate response from the broadcaster, he or she may refer a complaint to the ACMA for investigation.¹³¹ However, a breach of the Code is not a breach of the *Broadcasting Services Act 1992* (Cth), restricting the ACMA's ability to enforce compliance. The ACMA may only accept an informal or enforceable undertaking from a licensee, or make compliance with the Code a condition of the broadcaster's license.¹³²

An individual may complain directly to the ACMA about a breach of the *Broadcasting Services Act 1992* (Cth), or a licence condition.¹³³ The ACMA also enforces compliance with the CTS 2009, as compliance with the Standards is a licence condition.¹³⁴ This means that the public complain directly to the ACMA about a breach of the Standards. The ACMA enforces the Standards using a broad range of sanctions,¹³⁵ including imposing further licence conditions, accepting an undertaking or issuing a remedial direction,¹³⁶ pursuing a civil

¹²⁴ *Broadcasting Services Act 1992* (Cth) ss 42, 86, 99, sch 2 cls 7(1)(a) (commercial television broadcasting licences), s 8(1)(a) (commercial radio), s 9(1)(a) (community broadcasting licences), 10(1)(a) (subscription television broadcasting licences), s 11(1)(a) (services provided under class licences).

¹²⁵ Free TV, *2010 Commercial Television Industry Code of Practice* (at 11 July, 2013) cl 1.5.

¹²⁶ *Ibid.*

¹²⁷ *Ibid* cl. 7.10. Licensees refer complaints about the content of advertising to the Advertising Standards Board, as discussed below.

¹²⁸ *Ibid* cl 7.10.2.

¹²⁹ *Ibid* cl 7.15.

¹³⁰ *Ibid.*

¹³¹ *Ibid*; *Broadcasting Services Act 1992* (Cth) s 148.

¹³² *Broadcasting Services Act 1992* (Cth) s 43, 44(2)(a). See also Australian Communications and Media Authority, *Broadcasting Investigations* (20 August 2012)

<http://www.acma.gov.au/WEB/STANDARD/pc=PC_90147>.

¹³³ *Broadcasting Services Act 1992* (Cth) s 147.

¹³⁴ *Ibid* sch 2, cl 7(1)(b).

¹³⁵ *Ibid* s 139.

¹³⁶ *Ibid* ss 141, 205W.

penalty order in the Federal Court, referring the matter for prosecution as an offence or (for certain categories of service) suspending or cancelling the broadcaster's licence.¹³⁷ However, the ACMA rarely makes use of its more punitive powers, inviting the criticism that it is a 'toothless tiger'.¹³⁸ Further, neither the ACMA nor Free TV Australia monitors compliance with the CTS 2009 or the Free TV Code.¹³⁹ Enforcement processes rely upon viewers making complaints to either licensees or the ACMA. However, the Free TV Code establishes onerous procedures for laying complaints, which assume that members of the public have the time, knowledge and expertise to monitor advertising and make complaints.¹⁴⁰ As discussed above, difficulties in determining when the CTS apply may also hinder consumer complaints about breaches of the Standards. Thus, monitoring and enforcement of the CTS and the Free TV Code are inadequate, permitting routine non-compliance by licensees.¹⁴¹

3. Advertising industry self-regulation

The Australian Association of National Advertisers' scheme

A central component of advertising regulation is self-regulation by the advertising industry. Prior to 1997, the Media Council of Australia (an association of commercial media industry groups) ran the industry's self-regulatory system.¹⁴² This system collapsed in 1996, and in 1997 the Australian Association of National Advertisers (AANA) established a new system of self-regulation.¹⁴³ The AANA's scheme is based on a central *Code of Ethics* and a series of product-specific codes. The AANA also created a system handling advertising complaints, the main components of which are the Advertising Standards Bureau, the Advertising Standards Board (ASB), the Advertising Claims Board and an Independent Reviewer.¹⁴⁴ The AANA sponsored the formation of the Advertising Standards Bureau and the ASB; however

¹³⁷ Ibid ss 140A, 143, 209.

¹³⁸ Handsley et al, 'Regulatory Axes on Food Advertising to Children on Television' above n 83, 97-99. See also Belinda Reeve, 'The Regulatory Pyramid Meets the Food Pyramid: Can Regulatory Theory Improve Controls on Television Food Advertising to Australian Children?' (2011) 19 *Journal of Law and Medicine* 128.

¹³⁹ Handsley, 'Media, Public Health and Law: A Lawyer's Primer on the Food Advertising Debate', above n 85, 96.

¹⁴⁰ Ibid.

¹⁴¹ See also King et al, 'Consultancy Report on Inappropriate Food Marketing to the National Preventative Taskforce', above n 82, 8.

¹⁴² For an overview, see Gail Pearson, 'Disbanding An Effective System for Self-Regulation of Advertising: Beyond the Media Council of Australia' (1999) 22(3) *Journal of Consumer Policy* 331.

¹⁴³ Ibid 341-342.

¹⁴⁴ Advertising Standards Bureau, Submission No 27 to House of Representatives Standing Committee on Social Policy and Legal Affairs, *Inquiry into the Regulation of Billboard and Outdoor Advertising*, 18 February 2010, 2

<http://www.aph.gov.au/parliamentary_business/committees/house_of_representatives_committees?url=spla/outdoor%20advertising/subs.htm>.

the Bureau operates under separate management so as to maintain its independence from the advertising industry.¹⁴⁵ The Advertising Standards Bureau acts as the secretariat for the ASB and the Advertising Claims Board. It accepts and processes complaints about advertising and also promotes the role of the ASB in the self-regulatory system.¹⁴⁶

The ASB considers advertising complaints made by members of the public. It comprises 20 people from a range of age groups and backgrounds, and is gender balanced. ASB members serve for a fixed term, and the Bureau staggers new appointments so that the ASB retains expertise and knowledge in interpreting the codes, while at the same time introducing new members with different experiences and skills.¹⁴⁷ The Advertising Claims Board provides a separate adjudication process for complaints lodged by competitors, and considers the truth, accuracy or legality of advertising on a user-pays basis.¹⁴⁸ It comprises a Panel of experts in advertising and trade practices law.¹⁴⁹ Both advertisers and members of the public may seek review of the ASB's determinations from the independent reviewer, who assesses the validity of complaint determination processes or any new evidence provided by the parties.¹⁵⁰

Advertising industry codes of conduct

The centrepiece of the self-regulatory system is the AANA's *Code of Ethics*.¹⁵¹ The Code contains a set of broad principles that apply to advertising and marketing communications in all media.¹⁵² It deals with matters relating to decency, taste and community standards in advertising. The first section of the Code requires compliance with all relevant state and federal legislation, and prohibits advertising that is misleading or deceptive.¹⁵³ The second section prohibits advertising that is discriminatory, portrays violence, or depicts material contrary to prevailing community standards on health or safety.¹⁵⁴ It also restricts the

¹⁴⁵ Ibid 16.

¹⁴⁶ Ibid 3.

¹⁴⁷ Ibid 4.

¹⁴⁸ Ibid 5.

¹⁴⁹ Ibid.

¹⁵⁰ Ibid 31.

¹⁵¹ Australian Association of National Advertisers, *Australian Association of National Advertisers Code of Ethics* (2012) <<http://www.aana.com.au/pages/aana-code-of-ethics.html>>.

¹⁵² Australian Association of National Advertisers, Submission No 17 to House of Representatives Standing Committee on Social Policy and Legal Affairs, *Inquiry into the Regulation of Billboard and Outdoor Advertising*, 18 February 2011, 7

<http://www.aph.gov.au/parliamentary_business/committees/house_of_representatives_committees?url=spla/outdoor%20advertising/subs.htm>.

¹⁵³ Australian Association of National Advertisers, *Australian Association of National Advertisers Code of Ethics*, above n 151, s 1.

¹⁵⁴ Ibid cls 2.1, 2.3, 2.6.

depiction of sex, sexuality and nudity, as well as the use of strong or obscene language.¹⁵⁵ The *Code of Ethics* is supplemented by four codes that deal with specific areas of marketing communication, including the *Code for Marketing and Advertising Communications to Children* (the ‘Children’s Code’)¹⁵⁶ and the *Food and Beverages: Advertising and Marketing Communications Code* (the ‘Food Code’).¹⁵⁷

The Children’s Code seeks to ‘ensure that advertisers and marketers develop and maintain a high sense of social responsibility in advertising and marketing to children’.¹⁵⁸ It applies to ‘Advertising or Marketing Communications to Children’, defined as where the theme, visuals and language used are directed to children and are for Product.¹⁵⁹ The Code requires that advertising to children not be misleading, deceptive or ambiguous.¹⁶⁰ It covers a broad range of other matters, including sexualisation, safety, privacy and advertising’s compliance with ‘prevailing community standards’.¹⁶¹

The Code restates requirements found in the CTS and the Free TV Code that relate to parental authority, competitions, premiums, and the use of popular personalities.¹⁶² Clause 2.3 also says that advertising to children ‘must not be for, or relate in any way to, Alcohol Products, or draw any association with companies that supply Alcohol Products’.¹⁶³ In relation to food products, the code requires that advertising not encourage or promote an inactive lifestyle *or* unhealthy eating or drinking habits.¹⁶⁴ The Code does not define the meaning of ‘inactive lifestyle’ nor ‘unhealthy eating or drinking habits’. Advertising to children must also comply with the requirements of the Food Code.¹⁶⁵

¹⁵⁵ Ibid cls 2.4., 2.5.

¹⁵⁶ Australian Association of National Advertisers, *AANA Code for Marketing and Advertising Communications to Children* (May 2008) <<http://www.aana.com.au/pages/aana-code-for-advertising-marketing-communications-to-children.html>>.

¹⁵⁷ Australian Association of National Advertisers, *AANA Food and Beverages Advertising and Marketing Communications Code* (August 2009) <<http://www.aana.com.au/data/Documents/Codes/AANAFoodandBeveragesCodeAugust2009.pdf>>. See also Australian Association of National Advertisers, *Environmental Claims in Advertising and Marketing Code* (2009) <<http://www.aana.com.au/data/Documents/Codes/EnvironmentalClaimsCode-September2009.pdf>>.

¹⁵⁸ Australian Association of National Advertisers, *Code for Marketing and Advertising Communications to Children*, above n 156, 1.

¹⁵⁹ Ibid 1. ‘Product’ is defined in the Code as ‘goods, services and/or facilities that are targeted toward and have principal appeal for children’ (ibid).

¹⁶⁰ Ibid cls 2.2(a), (b).

¹⁶¹ Ibid cls 2.4, 2.5, 2.8, 2.14.

¹⁶² Ibid cls 2.7, 2.10, 2.11, 2.12.

¹⁶³ Ibid cl 2.13.

¹⁶⁴ Ibid cl 2.15(a).

¹⁶⁵ Ibid cl 2.15(b).

The Food Code states that food and beverage advertising must not be misleading or deceptive or otherwise contravene prevailing community standards.¹⁶⁶ A specific section of the code concerns advertising to children.¹⁶⁷ It requires that advertising clearly present health and nutrition claims and prohibits advertising that uses a misleading or deceptive sense of urgency.¹⁶⁸ Advertisers should not exploit children's imagination in a way that could encourage excessive consumption.¹⁶⁹ Advertising should not undermine parents' role in guiding children's eating and lifestyle habits, nor should it appeal to children to urge parents or caregivers to buy products for them.¹⁷⁰ Advertising to children must only feature premiums where they are an 'integral element' of the Children's Food or Beverage Product being offered.¹⁷¹

The Food Code also prohibits food advertising that would undermine the importance of healthy or active lifestyles or balanced diets, or which encourages excess consumption.¹⁷² However, the portrayal of excessive or compulsive consumption is unusual in food marketing campaigns,¹⁷³ meaning that this provision is likely to have little impact on food advertising to children.¹⁷⁴ Further, the provision does not regulate the types of foods and beverages promoted to children. Thus, it permits advertisers to promote unhealthy foods and beverages to children, so long as advertising meets the Code's requirements for advertising messaging and the use of persuasive techniques. As with the Free TV Code, the Food Code does not restrict the timing, volume or placement of food advertising to children.¹⁷⁵

4. Industry codes of conduct

Industry bodies in Australia have developed product-specific advertising codes of conduct. These codes include the ABAC and the Outdoor Media Association's (OMA) *Code of*

¹⁶⁶ Australian Association of National Advertisers, *AANA Food and Beverages Advertising and Marketing Communications Code*, above n 157, cl 2.1.

¹⁶⁷ *Ibid* s 3.

¹⁶⁸ *Ibid* cl 3.1.

¹⁶⁹ *Ibid* cl 3.2.

¹⁷⁰ *Ibid* cls 3.4, 3.5.

¹⁷¹ *Ibid* cl 3.6. The Code defines 'Children's Food or Beverage Product' as any food or beverage product (other than alcoholic beverages) that is targeted toward and has principal appeal to children (*ibid* s 1).

¹⁷² *Ibid* cl 2.2.

¹⁷³ King et al, 'Consultancy Report on Inappropriate Food Marketing to the National Preventative Taskforce', above n 82, 8; Handsley et al, 'Media, Public Health and Law: A Lawyer's Primer on the Food Advertising Debate', above n 85, 100.

¹⁷⁴ *Ibid*.

¹⁷⁵ King et al, 'Consultancy Report on Inappropriate Food Marketing to the National Preventative Taskforce', above n 82, 8.

Ethics.¹⁷⁶ This last code sets out standards for outdoor media agencies and requires compliance with other forms of advertising regulation.¹⁷⁷ The OMA's *Alcohol Advertising Guidelines* prohibit the display of alcohol advertising on fixed signs that are located within a 150 metre sight line of a primary or secondary school.¹⁷⁸ Further, OMA members will only accept alcohol advertisements that have been through the Alcohol Advertising Pre-vetting Service (described below).¹⁷⁹

Food industry initiatives

Chapter 1 described how the Australian food industry has created two initiatives that regulate food and beverage advertising directed to children, i.e. the RCMI and the QSRI. The initiatives go beyond the requirements of the AANA codes by imposing a positive obligation on advertising to promote and encourage healthy dietary choices.¹⁸⁰ The terms of the initiatives mirror provisions found in the Food Code and the Children's Code, but they contain additional restrictions on promotional techniques such as adver-gaming and in-school marketing.¹⁸¹ Unlike the Food Code, the initiatives restrict the type of food and beverage products that can be advertised to children to those that are 'healthier dietary choices'.¹⁸² Another difference is that the RCMI and QSRI are signatory based schemes, meaning that they only apply to companies that join the codes. In contrast, the AANA's self-regulatory system applies to all advertisers and marketers. Chapter 6 discusses the terms and conditions of the codes in further detail.¹⁸³

Administration of the food industry's codes

The AANA is responsible for the overall functioning of advertising self-regulation. In addition, industry-specific codes are administered and enforced by bodies within the industry

¹⁷⁶ Outdoor Media Association, *Code of Ethics* (May 2012) <<http://oma.org.au/regulation-and-community>>.

¹⁷⁷ *Ibid* 2.

¹⁷⁸ Outdoor Media Association, *OMA Alcohol Advertising Guidelines* (Undated) <<http://oma.org.au/regulation-and-community>>.

¹⁷⁹ *Ibid*.

¹⁸⁰ Susannah Tymms, 'Responsible Advertising to Children: An Independent Review of the Australian Food and Beverage Industry Self-Regulatory Codes' (Australian Food and Grocery Council, October 2012) 18 <<http://www.afgc.org.au/industry-codes/advertising-to-children/rcmi/rcmi-reports-2009.html>>

¹⁸¹ Australian Food and Grocery Council, *Responsible Children's Marketing Initiative of the Australian Food and Beverage Industry* (March 2011) 2 <<http://www.afgc.org.au/industry-codes/advertising-kids.html>>; Australian Quick Service Restaurant Industry, *Initiative for Responsible Advertising and Marketing to Children* (June 2009) cls 4.4, 4.5 Australian Association of National Advertisers <<http://www.aana.com.au/QuickServiceRestaurantInitiative.htm>>.

¹⁸² Australian Food and Grocery Council, *Responsible Children's Marketing Initiative*, above n 181, 1; Australian Quick Service Restaurant Industry, above n 181, cl 4.1.(b)(i).

¹⁸³ Table 1 in Chapter 1 also provides an overview of key terms and conditions in the initiatives.

concerned. The ASB hears complaints about breaches of the RCMI and QSRI, while the Australian Food and Grocery Council (AFGC) manages the other administrative processes established by the codes. Chapter 7 describes the AFGC's administration of the RCMI and QSRI, including monitoring food advertising,¹⁸⁴ gathering information on companies' compliance and annually reporting on the scheme,¹⁸⁵ and commissioning external evaluation of its functioning.¹⁸⁶

The Advertising Standards Bureau operates as a 'one-stop-shop' for complaints about advertising. It receives all public (and competitor) complaints, regardless of the product advertised.¹⁸⁷ Upon receipt of a complaint, the Bureau first assesses whether complaints are suitable to be forwarded to the ASB for determination. The ASB will not make a determination on certain complaints, namely those which:¹⁸⁸

- Involve an advertisement the ASB has already made a recent determination on;
- Do not deal with 'Advertising or Marketing Communications' for the purposes of the AANA codes; or
- Would involve determining a question of law or a matter related to truth or accuracy.

The ASB assesses complaints against all relevant codes, regardless of whether the complaint mentions a particular code or not.¹⁸⁹ Accordingly, it will consider complaints about food advertising against the *Code of Ethics*, the Food Code, the Children's Code and the RCMI and QSRI. It evaluates the complaint in light of all relevant advertising material provided by the advertiser, the advertiser's response to the complaint and any other supporting material, representations or submissions.¹⁹⁰ An arbiter with nutrition expertise advises the ASB on whether advertised products meet nutritional criteria for identifying 'healthier choice

¹⁸⁴ See, e.g., Australian Food and Grocery Council, *Responsible Children's Marketing Initiative 2011 Compliance Report* (2011) <<http://www.afgc.org.au/industry-codes/advertising-to-children/rcmi/rcmi-reports-2009.html>>.

¹⁸⁵ See, e.g., Australian Food and Grocery Council, *Food and Beverage Advertising to Children: Activity Report* (2012) <<http://www.afgc.org.au/industry-codes/advertising-to-children/rcmi/rcmi-reports-2009.html>>.

¹⁸⁶ See Tymms, above n 180. See also Healthy Kids Association, *Final Report on the Compliance of Signatories to the Australian Quick Service Restaurant Industry Initiative for Responsible Advertising to Children* (2011) Australian Food and Grocery Council <<http://www.afgc.org.au/tools-guides-.html>>.

¹⁸⁷ Management Committee of the ABAC Scheme, *The ABAC Scheme Annual Report 2006* (2006) 8 The ABAC Scheme <<http://www.abac.org.au/publications/annual-reports/>>.

¹⁸⁸ The ASB refers complaints about misleading and deceptive advertising to the ACCC or the relevant state/territory Department of Fair Trading and Consumer Affairs. See Advertising Standards Bureau, above n 144, 13.

¹⁸⁹ See Advertising Standards Bureau, above n 144, 17.

¹⁹⁰ *Ibid* 16.

products' that can be advertised to children, according to the terms of the QSRI and RCMI.¹⁹¹ Following the ASB's determination, the Bureau notifies the advertiser of the outcome and sends the advertiser a copy of the draft report. In the event of a breach, the ASB asks the advertiser to modify or discontinue the advertising communication within five business days of receiving the report. The ASB also gives advertisers the opportunity to include a statement in the final draft report. The Bureau publishes all complaint determinations on its website within ten business days of the ASB's decision.¹⁹²

Although the ASB may ask an advertiser to modify or discontinue an advertisement, there are no formal mechanisms available for enforcing the codes. According to the Free TV Code, television and radio broadcasters are expected to ensure that their advertising complies with the AANA's *Code of Ethics* and the Children's Code.¹⁹³ Yet, the ASB has no legal authority to begin court proceedings or to issue fines against advertisers who do not comply with its rulings.¹⁹⁴ It may note the advertiser's failure to respond in its final report on the complaint, forward the complaint to media proprietors, or refer the case to an appropriate government agency,¹⁹⁵ but there is little evidence that it uses these powers in practice.¹⁹⁶ The Commercial Advice Division of Free TV may also refuse to classify a (broadcast) advertisement that does not comply with the AANA's codes of conduct. Broadcasters will not screen an advertisement without this classification,¹⁹⁷ meaning that a refusal to classify an advertisement may act as additional sanction for non-compliance with advertising self-regulation.

Where the ASB upholds a complaint, the advertiser may ask for a review of its decision by an Independent Reviewer.¹⁹⁸ Conversely, complainants can request a review of the ASB's decision to dismiss a complaint. Review is only available where new or additional information comes to light that could substantially affect the determination; the determination

¹⁹¹ Australian Food and Grocery Council, *Responsible Children's Marketing Initiative 2011 Compliance Report*, above n 184, 6.

¹⁹² Advertising Standards Bureau, above n 144, 17-18.

¹⁹³ Free TV, *2010 Commercial Television Industry Code of Practice* (at 11 July, 2013) cl 1.11.

¹⁹⁴ Handsley et al, 'Media, Public Health and Law: A Lawyer's Primer on the Food Advertising Debate', above n 85, 96.

¹⁹⁵ Australian Association of National Advertisers, Submission to the *Inquiry into the Regulation of Billboard and Outdoor Advertising*, above n 152, 18.

¹⁹⁶ The Advertising Standards Bureau says that advertisers almost always comply with the ASB's rulings, suggesting that it rarely needs to use these measures. See Advertising Standards Bureau, above n 144, 10.

¹⁹⁷ Peter Le Guay, 'The Regulation of Advertising to Children in Australia - Update' (2012) 13(4) *Young Consumers* <<http://www.emeraldinsight.com/journals.htm?issn=1747-3616&volume=13&issue=4&articleid=17063729&show=html>>.

¹⁹⁸ Advertising Standards Bureau, *Independent Review of ASB Determinations* (undated) <<http://www.adstandards.com.au/process/theprocesssteps/independentreviewofasbdeterminations>>

is clearly in error having regard to the provisions of the codes or the evidence; or there is a substantial flaw in the ASB's decision-making processes.¹⁹⁹ The Reviewer does not perform a merit review, but recommends whether the ASB's original determination should be confirmed or submitted back to the ASB for reconsideration.²⁰⁰ The ASB must consider, but is not obliged to accept, the Reviewer's recommendation.²⁰¹ If the ASB reconsiders its determination, its new decision will be final and cannot be reviewed again.²⁰²

The ABAC Scheme

The alcohol industry created the current ABAC in 1997 after the Media Council of Australia dismantled its self-regulatory system.²⁰³ However, it was also a response to the adoption of a *National Health Policy on Alcohol* in 1989 by the Ministerial Council on Drug Strategy.²⁰⁴ This policy identified the need for a specific code on alcohol advertising, as existing forms of self-regulation did not adequately protect public health.²⁰⁵ Following consultation processes around the policy, the alcohol industry adopted a pre-vetting system for alcohol advertising in 1992.²⁰⁶ In 1997 the four main industry bodies created the ABAC, with input from marketing industry associations, advertising, media and consumer bodies, Federal Ministers and Departments, and the ACCC.²⁰⁷ The four industry associations involved in the creation of the ABAC were the Australian Associated Brewers, the Distilled Spirits Industry Council of Australia, the Liquor Merchants Association of Australia and the Winemakers' Federation of Australia.²⁰⁸ The contemporary scheme consists of the code and associated documents, the ABAC Management Committee, the ABAC Adjudication Panel and the Alcohol Advertising Pre-vetting Service.

¹⁹⁹ Ibid.

²⁰⁰ Advertising Standards Bureau, above n 144, 31.

²⁰¹ Australian Association of National Advertisers, Submission to the *Inquiry into the Regulation of Billboard and Outdoor Advertising*, above n 152, 19.

²⁰² Ibid.

²⁰³ National Committee for the Review of Alcohol Advertising, 'Review of the Self-Regulatory System for Alcohol Advertising. Report to the Ministerial Council of Drug Strategy' (Minister for Health Victoria, 2003) 2 <[http://docs.health.vic.gov.au/docs/doc/2E4E141E5A719092CA2578A1000A1CB0/\\$FILE/nkraareport.pdf](http://docs.health.vic.gov.au/docs/doc/2E4E141E5A719092CA2578A1000A1CB0/$FILE/nkraareport.pdf)>.

²⁰⁴ Ibid. See also Ministerial Council on Drug Strategy Sub-Committee, *National Health Policy on Alcohol in Australia* (Commonwealth of Australia, 1990) <<http://www.nationaldrugstrategy.gov.au/internet/drugstrategy/publishing.nsf/Content/nhpa-example-strat-imp>>.

²⁰⁵ Ministerial Council on Drug Strategy Sub-Committee, above n 204, 6.

²⁰⁶ National Committee for the Review of Alcohol Advertising, above n 203, 17.

²⁰⁷ Ibid 11.

²⁰⁸ Ibid.

Since its inception in 1997, a number of government reviews have considered the operation of the ABAC and whether it sufficiently protects children from alcohol advertising.²⁰⁹ The most influential of these was an investigation of alcohol advertising led by the Ministerial Council on Drug Strategy and performed by the National Committee for the Review of Alcohol Advertising (a sub-committee of the Intergovernmental Committee on Drugs).²¹⁰ This inquiry resulted in significant changes to the content and scope of the ABAC, as well as to the governance processes attached to the code. Specifically, the alcohol industry added a new preamble requiring that participants adhere to the spirit as well as the letter of the Code and reflecting the goal that alcohol advertising should not encourage underage drinking or irresponsible alcohol consumption.²¹¹ The industry extended the ABAC to internet sites designed to promote alcohol products, as well as to banner advertising on third party sites,²¹² and included a protocol on the promotion of alcohol at events.²¹³ In 2009 the industry further amended the ABAC to cover the labelling and packaging of alcohol products.²¹⁴ The evolution of the ABAC Scheme will be discussed further in later chapters. The current ABAC consists of four separate components, namely:

- A preamble that includes a guiding statement about how the Panel will assess conformity of advertising with the ABAC;²¹⁵
- Part 1 of the Code, consisting of definitions and the substantive standards that apply to alcohol beverage advertising;²¹⁶
- Three ‘protocols’ covering internet advertising, retail advertisements and the promotion of alcohol at events;²¹⁷ and

²⁰⁹ See Standing Committee on Community Affairs, Parliament of Australia, *Alcohol Toll Reduction Bill 2007 [2008]*, above n 123; National Committee for the Review of Alcohol Advertising, above n 203; Standing Committee on Family and Community Affairs, Parliament of Australia, *Road to Recovery: Report on Inquiry into Substance Abuse in Australian Communities* (2003) <http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=fca/subabuse/report.htm>; NSW Alcohol Summit, 'Outcomes of the NSW Summit on Alcohol Abuse 2003: Changing the Culture of Alcohol Use in New South Wales' (The Alcohol Summit Coordination Unit, NSW Government, 2003); Drugs and Crime Prevention Committee, Parliament of Victoria, 'Inquiry into Strategies to Reduce Harmful Alcohol Consumption Final Report' (March 2006) vol 1 <http://www.parliament.vic.gov.au/images/stories/committees/dcpc/alcoholharmreduction/DCPC-Report_Alcohol_Vol1_2006-03.pdf>.

²¹⁰ National Committee for the Review of Alcohol Advertising, above n 203.

²¹¹ Ibid 28; Management Committee of the ABAC Scheme, *The ABAC Scheme Annual Report 2004* (2004) 12 The ABAC Scheme <<http://www.abac.org.au/publications/annual-reports/>>.

²¹² National Committee for the Review of Alcohol Advertising, above n 203, 28; Management Committee of the ABAC Scheme, *The ABAC Scheme Annual Report 2004*, above n 211, 13.

²¹³ Management Committee of the ABAC Scheme, *The ABAC Scheme Annual Report 2004*, above n 211, 13.

²¹⁴ Ibid i.

²¹⁵ The ABAC Scheme Limited, *The ABAC Scheme: Alcohol Beverages Advertising (and Packaging) Code* (1 March 2012) 1 <<http://www.abac.org.au/publications/thecode/>>

²¹⁶ Ibid 1-2.

- Part 2 of the Code, which applies the standards contained in Part 1 to the naming and packaging of alcohol beverages.²¹⁸

The preamble states that the goal of the ABAC is:²¹⁹

... to ensure that alcohol advertising will be conducted in a manner which neither conflicts with nor detracts from the need for responsibility and moderation in liquor merchandising and consumption, and which does not encourage consumption by underage persons.

The preamble also provides that conformity of an advertisement with the Code is to be assessed in terms of the advertisement's probable impact upon a reasonable person to whom the advertisement is directed, taking its content as a whole.²²⁰ Part 1 sets out a series of specific standards to be applied to alcohol advertising, which require that such advertising not encourage specific behaviours or associate alcohol with particular forms of social activity.²²¹

Accordingly, the code prohibits alcohol advertising that:

- Presents an irresponsible approach to alcohol consumption or encourages excessive consumption;²²²
- Encourages underage drinking or has 'strong or evident' appeal to children;²²³
- Suggests that the presence or consumption of alcohol beverages may contribute to a change in mood or environment;²²⁴
- Depicts a direct association between the consumption of alcohol beverages and the operation of motor vehicles or engagement in sport or any hazardous activity;²²⁵
- Challenges or dares individuals to drink a particular alcohol beverage;²²⁶
- Encourages consumption in excess of the *Guidelines to Reduce Health Risks from Drinking Alcohol*;²²⁷ and
- Brings the ABAC Scheme into disrepute.²²⁸

²¹⁷ Ibid 3-4.

²¹⁸ Ibid 4-5.

²¹⁹ Ibid 1.

²²⁰ Ibid.

²²¹ See ABAC Complaints Panel, *Determination No: 17-21/10* (26 April 2010) 7

<<http://www.abac.org.au/adjudication/17-21-10-tooheys-26-april-2010/>>.

²²² The ABAC Scheme Limited, Alcohol Beverages Advertising (and Packaging) Code, above n 215, pt 1(a)(i).

²²³ Ibid pt 1(a)(ii), (b).

²²⁴ Ibid pt 1(c).

²²⁵ Ibid pt 1(d).

²²⁶ Ibid pt 1(e).

²²⁷ Ibid pt 1(g). See National Health and Medical Research Council, 'Australian Guidelines to Reduce Health Risks from Drinking Alcohol' (Commonwealth of Australia, 2009)

<<http://www.nhmrc.gov.au/guidelines/publications/ds10>>.

The Code also requires that advertisers comply with the AANA's *Code of Ethics*.²²⁹ Sections (a) and (b) contain provisions on alcohol advertising's appeal to children, which I discuss in Chapter 6.

The administration of the ABAC Scheme

The ABAC Management Committee monitors and reviews the operation of the ABAC Scheme. The Committee's membership includes representatives from the Distilled Spirits Industry Council of Australia, the Winemakers' Federation of Australia, the Brewers' Association of Australia and New Zealand, the federal Department of Health and Ageing and two members of the Communications Council (an industry body representing advertising agencies).²³⁰ The Committee amends the terms of the ABAC and promotes it to industry actors.²³¹ It also monitors the scheme and coordinates the creation of an annual report, which is published on the ABAC Scheme website.²³² This report provides an overview of the scheme's functioning, including any amendments made to the ABAC, the number of complaints determined and any particular issues raised by complaint determinations.

The Management Committee administers the Alcohol Advertising Pre-Vetting Service.²³³ It appoints two individuals from outside the alcohol industry to vet alcohol advertisements against the ABAC and the AANA *Code of Ethics*, prior to their broadcast or publication.²³⁴ According to the ABAC, beer producers must pre-vet all advertising against this code and optionally against the *Code of Ethics*.²³⁵ Spirits advertisers must pre-vet all advertisements against the ABAC and the *Code of Ethics*, excluding internet and point-of-sale advertising and promotions at events.²³⁶ Wine producers must pre-vet all television, outdoor and cinema

²²⁸ Ibid pt 1(h).

²²⁹ Ibid pt 1(f).

²³⁰ Management Committee of the ABAC Scheme, *The ABAC Scheme Annual Report 2011* (2011) 2 The ABAC Scheme <<http://www.abac.org.au/publications/annual-reports/>>. The Liquor Merchants Association of Australia withdrew from the scheme in 2006 and no longer has representation on the Committee. See Management Committee of the ABAC Scheme, *The ABAC Scheme Annual Report 2009* (2009) 7 The ABAC Scheme <<http://www.abac.org.au/publications/annual-reports/>>.

²³¹ The ABAC Scheme Limited, *The ABAC Scheme: Rules and Procedures* (5 December 2012) cl 1.7 <<http://www.abac.org.au/publications/rules-procedures/>>.

²³² The ABAC Scheme Limited, *Annual Reports* (2013) <<http://www.abac.org.au/publications/annual-reports/>>.

²³³ The ABAC Scheme Limited, *The ABAC Scheme: Rules and Procedures*, above n 231, cl 1.7.

²³⁴ Ibid cl 5.2.

²³⁵ Ibid.

²³⁶ Ibid.

against the ABAC and the *Code of Ethics*.²³⁷ Pre-vetting of naming and packaging is optional for all alcohol manufacturers.²³⁸

The ABAC Adjudication Panel hears complaints about alcohol advertising and decides whether such complaints breach the ABAC. It operates independently from the alcohol industry, although its members are paid from funds provided by the alcohol industry bodies.²³⁹ The Panel consists of a Chief Adjudicator with a legal background (Professor Michael Lavarch, a former federal Attorney-General), two members with media or advertising industry backgrounds and two public health representatives. A public health representative sits on every three person panel convened by the Chief Adjudicator to hear a complaint.²⁴⁰ Although the ABAC has its own management committee and complaints adjudication panel, the ASB will hear complaints about alcohol advertising falling outside the scope of the Code.²⁴¹ Accordingly, alcohol advertising may be subject to two separate regulatory processes; those based within the alcohol industry and those run by the AANA.

Complaint hearing processes under the ABAC

The Advertising Standards Bureau forwards all complaints about alcohol product advertising to the ABAC Scheme's administrative officer. The administration officer sends the complaint to the Chief Adjudicator, who determines whether it falls within the ambit of the ABAC. In making this determination the Chief Adjudicator applies a 'negative test' and assesses whether the complaint raises issues solely relating to the *Code of Ethics*.²⁴² In doing so, the Chief Adjudicator looks only at the wording of the complaint, not at the advertisement itself. The Chief Adjudicator also considers whether the issue complained of would arise regardless of the product advertised.²⁴³ If this is the case, then the complaint does not relate to the terms of the ABAC, but falls within the jurisdiction of the ASB. If the complaint refers to alcohol as a specific product in some way, then it falls to the Adjudication Panel to determine the matter. Where this is the case, the Chief Adjudicator will then identify the relevant sections

²³⁷ Ibid.

²³⁸ Ibid.

²³⁹ National Committee for the Review of Alcohol Advertising, above n 203, 13. See also Robert J Donovan, Lynda Fielder and Geoffrey Jalleh, 'Alcohol Advertising Advocacy Research No Match for Corporate Dollars: The Case of Bundy R Bear' (2011) 20 *Journal of Research for Consumers* 1, 3.

²⁴⁰ The ABAC Scheme Limited, *The ABAC Scheme: Rules and Procedures*, above n 231, cls 2.4, 3.0(d).

²⁴¹ Ibid cl 3.

²⁴² Management Committee of the ABAC Scheme, *The ABAC Scheme Annual Report 2005* (2005) 6 The ABAC Scheme <<http://www.abac.org.au/publications/annual-reports/>>.

²⁴³ Management Committee of the ABAC Scheme, *The ABAC Scheme Annual Report 2007* (2007) 6 The ABAC Scheme <<http://www.abac.org.au/publications/annual-reports/>>.

of the ABAC raised by the complaint.²⁴⁴ Unlike the ASB, the Panel limits its determination to the matters discussed by the complainant. However, in contrast to the ASB the Panel will consider new complaints about an advertisement on which it has already made a determination.²⁴⁵

After considering the complaint, the Chief Adjudicator drafts a ‘show cause’ letter to the advertiser, describing the complaint, the sections of the ABAC raised by the matter and any questions the Chief Adjudicator has in relation to the complaint.²⁴⁶ Once the administrative officer receives the advertiser’s response, the Chief Adjudicator prepares a draft of the decision on the complaint.²⁴⁷ Three members of the Panel then meet to consider the complaint and the draft determination.²⁴⁸ Once the Panel is satisfied with the determination, the administrative officer notifies the complainant, the advertiser, the ABAC Management Committee and the pre-vetters of the Panel’s decision. The administrative officer publishes the Panel’s final decision on the ABAC Scheme’s website. If the Panel upholds the complaint, the advertiser has five business days to respond, and to state whether it intends to modify or discontinue the advertisement.²⁴⁹ Members of the three alcohol industry bodies that developed the Scheme are expected to comply with the Panel’s determinations.²⁵⁰ However, as with the ASB the Panel cannot enforce its determinations and there are no penalties for non-compliance.²⁵¹ Independent review of the Panel’s decisions is not available, meaning that its decision is final.

5. Conclusion

Tobacco, alcohol and food advertising regulation in Australia are a complex mixture of regulatory tools, including legislation, co-regulatory arrangements and voluntary industry self-regulation. Of the three products, tobacco advertising is the most heavily regulated, with legislative bans on almost all forms of commercial communication. Tobacco advertising controls are less complex than those regulating food and alcohol promotion, as restrictions

²⁴⁴ Management Committee of the ABAC Scheme, *The ABAC Scheme Annual Report 2005*, above n 242, 6.

²⁴⁵ However the Panel will not consider a complaint dealing with issues that have been fully considered and determined in a previous decision. See The ABAC Scheme Limited, *The ABAC Scheme: Rules and Procedures*, above n 231, cl 3.0(c)(i)(c).

²⁴⁶ Management Committee of the ABAC Scheme, *The ABAC Scheme Annual Report 2005*, above n 242, 6.

²⁴⁷ *Ibid.*

²⁴⁸ The ABAC Scheme Limited, *The ABAC Scheme: Rules and Procedures*, above n 231, cl 3(d).

²⁴⁹ *Ibid* cl 3(f).

²⁵⁰ *Ibid* cl 2.2(a).

²⁵¹ Standing Committee on Community Affairs, Parliament of Australia, *Alcohol Toll Reduction Bill 2007 [2008]*, above n 209, 15.

are contained in dedicated legislation.²⁵² Alcohol advertising to children is more heavily regulated by government than food advertising to children, given that there are co-regulatory restrictions on the placement of alcohol advertisements during children's viewing periods. Food and alcohol advertising fall within the AANA's self-regulatory system and both are subject to additional, product-specific controls. However, the ABAC has its own complaints adjudication mechanism, while the ASB hears complaints about breaches of the RCMI and QSRI. While most alcohol advertising is subject to pre-vetting, in other respects food advertising self-regulation is a more demanding voluntary scheme than the ABAC (and the AANA's system). This is because the AFGC actively monitors food advertising and requires participants to issue compliance reports on an annual basis.

This chapter pointed out limitations in the regulation of food advertising to children. There are few specific provisions on food advertising in the strongest forms of regulation, i.e. the CTS 2009 and the Free TV Code. With the exception of tobacco, the mandatory components of the advertising regulatory scheme are predominantly concerned with truth and accuracy in advertising.²⁵³ The advertising industry's codes of practice prohibit advertising that explicitly encourages excessive consumption, or which uses persuasive techniques in a manner that could mislead or confuse children. However there are few restrictions on the timing, placement and volume of food advertising or on the types of products advertised to children (with the exception of the RCMI and QSRI). Consequently, regulation does not affect children's daily exposure to legal and truthful advertising that promotes unhealthy foods and beverages.²⁵⁴

Regulatory controls also differ according to the media used in promotions. While broadcast advertising is highly regulated, advertisements in other media are only subject to self-regulation. Many self-regulatory measures are 'media neutral', but loopholes may emerge in relation to new communication channels and advertising techniques, for example, internet-based promotions and 'advergames'.²⁵⁵ Another concern is that enforcement processes for

²⁵² Reynolds, above n 19, 367.

²⁵³ Ibid.

²⁵⁴ C Hawkes, 'Self-Regulation of Food advertising: What It Can, Could and Cannot Do to Discourage Unhealthy Eating Habits Among Children' (2005) 30(4) *Nutrition Bulletin* 374, 380; S MacKay, et al, 'A Comprehensive Approach to Protecting Children from Unhealthy Food Advertising' (Obesity Policy Coalition 2011) 23 <<http://www.opc.org.au/whatwedo/policydocuments.aspx>>.

²⁵⁵ See, e.g., National Heart Forum, *An Analysis of the Regulatory and Voluntary Landscape Concerning the Marketing and Promotion of Food and Drink to Children* (2011) 60 <<http://www.heartforum.co.uk/our-work/policy/nutrition/marketing-food-and-drink-to-children/>>.

self-regulatory instruments are much weaker than those accompanying legislation and co-regulation, yet self-regulation is the main mechanism for restricting unhealthy food advertising to children. These issues will be considered more closely in the examination of the RCMI and QSRI in Chapters 6 and 7.

CHAPTER THREE

Public health and responsive regulation: a theoretical framework for public health governance

This chapter brings together public health law and regulatory studies to propose a theoretical framework for public health governance and, more specifically, for the problem this thesis addresses: persistent advertising of unhealthy food to children with little prospect of legislative action. First I describe the expanding scope of public health law and the creation of new forms of public health regulation. I also discuss literature conceptualising the state's role in public health and the justifications for government intervention in public health problems. The second half of the chapter explores regulatory studies literature and its view of the state in the context of 'regulatory capitalism'. Additionally, I describe how regulatory scholars design strategies that harness the capacities of self-regulation while compensating for its weaknesses, with a particular focus on the theory of responsive regulation. I outline some criticisms of a responsive regulatory approach, and show how these have been addressed in recent literature. Finally I identify some common themes in public health law and regulatory studies literature, which I use as the basis for a responsive approach to public health governance.

1. The increasing scope of public health law

The original jurisdiction of public health law was unsanitary conditions and noxious environments.¹ Following developments in the science of disease causation, it expanded to include infectious disease control, as well as food safety and workplace health.² The discipline's core functions were given effect in 19th century public health acts, found in countries such as the United States, England, Australia and New Zealand.³ These acts dealt with three key matters: establishing the administrative arrangements for providing public

¹ Christopher Reynolds, *Public Health and Environmental Health Law* (Federation Press, 2011) 5; Christopher Hamlin, 'State Medicine in Great Britain' in Dorothy Porter (ed), *The History of Public Health and the Modern State* (Rodopi, 1994) 132, 142-146.

² Reynolds, above n 1, 5; Hamlin, above n 1, 150; Elizabeth Fee, 'Public Health and the State: The United States' in Dorothy Porter (ed), *The History of Public Health and the Modern State* (Rodopi, 1994) 224, 236-237; Roger Magnusson, 'Mapping the Scope and Opportunities for Public Health Law in Liberal Democracies' (2007) 35(4) *Global Health Law, Ethics, and Policy* 571-572.

³ These Acts continue in force in each Australian state and territory. See, e.g., *Public Health Act 2010* (NSW). Reynolds, above n1, 179-180; Hamlin above n1; Fee above n 2; Magnusson, above n 2, 571-572; Linda Bryder, 'A New World? Two Hundred Years of Public Health in Australia and New Zealand' in Dorothy Porter (ed), *The History of Public Health and the Modern State* (Rodopi, 1994) 313.

health services; granting powers to manage local environmental health problems; and more recently, setting out powers for responding to listed infectious diseases.⁴ These laws can be conceptualised as protecting individuals from harms inflicted without their consent ('public bads').⁵ State action also targeted specific identifiable causal agents that could be minimised or eliminated.⁶ Pathogens or substances that presented a 'clear and present danger' to health thus justified the use of highly coercive powers, including bans, closures, seizures, quarantine, compulsory vaccination and criminal sanctions.⁷ Such measures imposed significant constraints on individual and commercial freedoms in the pursuit of the common good.⁸

During the twentieth century, non-communicable disease overtook communicable disease as the leading cause of global mortality and morbidity.⁹ Accordingly, law became a tool in public health efforts to address the risk factors for chronic disease, particularly the consumption of unhealthy food, tobacco and alcohol, as well as the social determinants of health.¹⁰ These latter are the social, economic and political factors that shape individual choices and lifestyles, and which play a fundamental role in non-communicable disease causation.¹¹

The new focus of public health law significantly expands states' public health powers, and potentially impinges upon the interests of powerful industries.¹² It also engages with social, economic and environmental policies outside of the health portfolio, implying that public health considerations should inform policy making across all sectors.¹³ In relation to obesity, it includes (often unpopular) measures such as 'fat taxes' on unhealthy foods and beverage,

⁴ Reynolds, above n 1, 179-180.

⁵ Richard Epstein, 'Let the Shoemaker Stick to His Last: A Defence of the "Old" Public Health' (2003) 46(3) *Perspectives in Biology and Medicine* S138, S139.

⁶ *Ibid* S145.

⁷ Mark Hall, 'The Scope and Limits of Public Health Law' (2003) 46(3) *Perspectives in Biology and Medicine* S199, S206.

⁸ See Lawrence Gostin, *Public Health Law: Power, Duty, Restraint* (University of California Press, 3rd ed, 2012) 11-12; Dorothy Porter, 'Introduction' in Dorothy Porter (ed), *The History of Public Health and the Modern State* (Rodopi, 1994) 1, 10.

⁹ See World Health Organisation, 'Global Strategy on Diet, Physical Activity and Health' (World Health Organisation, 2004) 2 <<http://www.who.int/dietphysicalactivity/strategy/eb11344/en/index.html>>.

¹⁰ Magnusson, above n 2, 574. Public health law is also concerned with new infectious diseases, such as HIV/AIDs and severe acute respiratory syndrome (SARS), as well as bioterrorism and gun control. See Christopher Reynolds, 'Public Health Law in the New Century' (2003) 10(4) *Journal of Law and Medicine* 435.

¹¹ Richard Wilkinson and Michael Marmot (eds), *Social Determinants of Health: The Solid Facts* (World Health Organisation, Regional Office for Europe, 2nd ed, 2003).

¹² Magnusson, above n 2, 572.

¹³ Ilona Kickbusch, Warren McCann and Tony Sherbon, 'Adelaide Revisited: From Healthy Public Policy to Health in All Policies' (2008) 23(1) *Health Promotion International* 1.

restrictions on large sized soft drinks and statutory regulation of unhealthy food advertising.¹⁴ Public health law also has a strong social justice focus.¹⁵ Evidence shows that unequal access to resources produces a gradient where those in lower socioeconomic groups have poorer health than those in higher groups – both within and between countries.¹⁶ Accordingly, public health interventions seek to reduce social inequalities to the extent that they affect health.¹⁷

There is considerable debate about the proper role of law in preventing non-communicable disease. Critics argue that using legislation to shape consumption habits (and social and economic conditions) is an inappropriate expansion of public health law. Although chronic diseases affect a growing number of people, they are neither communicable nor contagious; consequently, they do not directly threaten collective well-being.¹⁸ This perspective frames obesity as a problem of individual choice and individual consequences.¹⁹ In these circumstances, the state can persuade, educate or inform individuals to make healthier choices. However, coercing them to do so would be overly paternalistic if their choices do not affect others.²⁰

The counter-argument is that chronic disease places a huge social and economic burden on society, including on publicly-funded healthcare systems.²¹ Accordingly, states have a legitimate interest in preventing chronic disease and in recouping costs to the public purse.²² Further, individual choices are constrained by the broader social, economic and political

¹⁴ See, e.g., Michelle M Mello, David M Studdert and Troyen A Brennan, 'Obesity - The New Frontier of Public Health Law' (2006) 354(24) *The New England Journal of Medicine* 2601; Kelly D Brownell et al, 'The Public Health and Economic Benefits of Taxing Sugar-Sweetened Beverages' (2009) 361(16) *The New England Journal of Medicine* 1599; Molly E Bond et al, 'Taxing Junk Food: Applying the Logic of the Henry Tax Review to Food' (2010) 193(18) *Medical Journal of Australia* 472; Robert H Lustig, Laura A Schmidt, and Claire D Brindis, 'Public Health: The Toxic Truth About Sugar' (2012) 482(7383) *Nature* 27; Lawrence O Gostin, 'Banning Large Sodas is Legal and Smart' (March 13 2013) CNN <<http://edition.cnn.com/2013/03/13/opinion/gostin-soda-ban>>.

¹⁵ Gostin, *Public Health Law*, above n 8, 21

¹⁶ See Wilkinson and Marmot, above n 11, 10; Michael Marmot, 'Social Determinants of Health Inequalities' (2005) 365(9464) *The Lancet* 1099.

¹⁷ Magnusson, above n 2, 575; Gostin, *Public Health Law*, above n 8, 21-23; Nancy E Kass, 'An Ethics Framework for Public Health' (2001) 91(11) *Public Health Matters* 1776, 1781.

¹⁸ Epstein, above n 5, S154; Gostin, *Public Health Law* above n 8, 500. Research showing that obesity spreads within social networks challenges the idea that it is non-communicable. See Nicholas A Christakis and James H Fowler, 'The Spread of Obesity in a Large Social Network Over 32 Years' (2007) 357(4) *The New England Journal of Medicine* 370. But see also Ethan Cohen-Cole and Jason M Fletcher, 'Is Obesity Contagious? Social Networks vs Environmental Factors in the Obesity Epidemic' (2008) 27(5) *Journal of Health Economics* 1382.

¹⁹ Gostin, *Public Health Law*, above n 8, 500.

²⁰ Epstein, above n 5, S154. See also Gostin, *Public Health Law*, above n 8, 50.

²¹ See, e.g., Stephen Colagiuri et al, 'The Cost of Overweight and Obesity in Australia' (2010) 192(5) *Medical Journal of Australia* 260.

²² Gostin, *Public Health Law*, above n 8, 501.

environment.²³ State action is needed to address these social structures (and inequalities), which cannot be changed by individuals acting alone, and to help shape environments that support healthy choices.²⁴

Traditional public health governance involved ‘command-and-control’ regulation,²⁵ i.e., prescriptive standards developed and imposed by specialist government agencies.²⁶ However, emerging forms of public health governance move away from this model,²⁷ as described in Table 6 in the areas of alcohol, tobacco and food regulation. Examples of self-regulation purporting to achieve public health goals include corporate social responsibility strategies,²⁸ industry-level ‘pledges’ on food advertising to children²⁹ and transnational forms of private regulation, such as the *International Food and Beverage Alliance*.³⁰ There are examples of ‘civil regulation’ where health groups create voluntary schemes that challenge the dominance of the industry in public health’s ‘regulatory space’.³¹ Finally, public-private partnerships represent a type of regulatory hybrid, with civil society, government and industry actors working together in collaborative arrangements to address complex public health problems.³² Many have been critical of the value of voluntary schemes introduced by the food industry.³³ Nevertheless, they represent an increasingly common form of public health governance.

²³ Ibid 52.

²⁴ Gostin, *Public Health Law* above n 8, 9, 502-503; Karen Jochelson, 'Nanny or Steward? The Role of Government in Public Health' (2006) 120(12) *Public Health* 1149, 1155.

²⁵ Magnusson, above n 2, 578.

²⁶ Robert Baldwin, Colin Scott and Christopher Hood, 'Introduction' in Robert Baldwin, Colin Scott and Christopher Hood (eds), *A Reader on Regulation* (Oxford University Press, 1998) 1, 14.

²⁷ Magnusson, above n 2, 578.

²⁸ Michele Simon 'PepsiCo and Public Health: Is the Nation's Largest Food Company a Model of Corporate Responsibility or Master of Public Relations?' (2011) 15 *CUNY Law Review* 101.

²⁹ See, e.g., Australian Food and Grocery Council, *The Responsible Children's Marketing Initiative of the Australian Food and Beverage Industry* (March 2011) <<http://www.afgc.org.au/industry-codes/advertising-to-children/rcmi.html>>.

³⁰ International Food and Beverage Alliance, *Who We Are* (undated) <<https://www.ifballiance.org/about.html>>.

³¹ See Alcohol Advertising Review Board, *About Us* (2012) <<http://www.alcoholadreview.com.au/about/>>; L Hancher and M Moran, 'Organising Regulatory Space' in Robert Baldwin, Colin Scott and Christopher Hood (eds), *A Reader on Regulation* (Oxford University Press, 1998) 148.

³² World Health Organisation, *Public Private Partnerships for Health* (2012) <<http://www.who.int/trade/glossary/story077/en/>>; Vivica Kraak et al, 'Balancing the Benefits and Risks of Public-Private Partnerships to Address the Global Double Burden of Malnutrition' (2012) 15(3) *Public Health Nutrition* 503. See also, Healthy Weight Commitment Foundation, *Overview* (undated) <<http://www.healthyweightcommit.org/about/overview/>>.

³³ See, e.g., William H Wiist, 'The Corporate Play Book, Health and Democracy: The Snack Food and Beverage Industry's Tactics in Context' in David Stuckler and Karen Siegal (eds), *Sick Societies: Responding to the Global Challenges of Chronic Disease* (Oxford University Press, 2011) 204; David Fuchs, Agni Kalfagianni and Tetty Havinga, 'Actors in Private Food Governance: The Legitimacy of Retail Standards and Multistakeholder Initiatives with Civil Society Participation' (2011) 28(3) *Agriculture and Human Values* 353; David Stuckler and Marion Nestle, 'Big Food, Food Systems and Global Health' (2012) 9(6) *PLoS Medicine* 1 <<http://www.plosmedicine.org/article/info%3Adoi%2F10.1371%2Fjournal.pmed.1001242>>; Kelly D Brownell,

Table 6. Examples of different forms of public health regulation

Form of regulation	Example	Description	Leading sector	Involvement by other actors
Statutory regulation	<i>Tobacco Prohibition Act 1992</i> (Cth).	Australian Government legislation enacting a ban on all forms of tobacco advertising and promotion.	The Commonwealth Government.	Top-down approach excluding businesses and civil society from regulatory processes.
Co-regulation	<i>UK Code of Broadcast Advertising</i> (BCAP Code).	Regulates broadcast advertising, and includes restrictions on the placement and content of advertisements for unhealthy products that target children.	OfCom retains ultimate responsibility for advertising regulation and remains the backstop enforcer of the BCAP Code.	An industry-based organisation writes the code, while an independent body enforces it.
Quasi-regulation	<i>Alcohol Beverages Advertising (and Packaging) Code</i> (ABAC).	A voluntary code that regulates the content of alcohol advertisements by Australian alcohol manufacturers.	Three alcohol industry bodies collaborate to develop, administer and enforce the code.	Following a government review, the industry included government representation in the scheme's administration and public health representation in the complaints hearing mechanism.
Self-regulation	Australian Food and Grocery Council <i>Responsible Children's Marketing Initiative</i> .	A voluntary code that regulates the content and placement of unhealthy food advertising to children.	A food industry trade association (the Australian Food and Grocery Council) created and administers the code.	An independent body hears consumer complaints. There is little to no engagement with civil society, but some government monitoring of the scheme.
'Civil regulation' created by NGOs or civil society actors	Alcohol Advertising Review Board and <i>Alcohol Advertising Review Board Code</i> .	An Australian public health organisation scheme to regulate the content and placement of alcohol advertisements via a code of conduct.	Public health organisations joined together to create a 'competitor scheme' to challenge the Australian alcohol industry's ABAC Scheme (described above).	Administered by public health representatives, and includes an independent panel to hear consumer complaints. No participation by industry or government actors.
Public-private partnership	The US Healthy Weight Commitment Foundation.	A private-public partnership that aims to reduce childhood obesity through product reformulation, social media, school-based nutrition and physical activity programs and education campaigns.	Managed by an industry-led organisation.	The Foundation includes retailers, food and beverage manufacturers, restaurants, insurance companies, trade associations, NGOs and professional sports organisations.

'Thinking Forward: The Quicksand of Appeasing the Food Industry' (2012) 9(7) *PLoS <Medicine 1*
<http://www.plosmedicine.org/article/info%3Adoi%2F10.1371%2Fjournal.pmed.1001254>>.

Governments are also designing novel regulatory schemes for public health. Recent proposals for Australian food law and policy take a staged approach, beginning with voluntary industry action accompanied by government monitoring and the threat of further regulation. This was the approach taken by Australia's National Preventive Health Taskforce, which suggested a 'responsive' regulatory approach to restrictions on food marketing.³⁴ The Independent Panel that reviewed Australian food labelling law and policy suggested a similar 'responsive' strategy.³⁵ It sought to 'involve stakeholders in developing self-regulatory and co-regulatory measures, but recognising that more prescriptive modes of regulation are often appropriate'.³⁶ For example, the Panel recommended that industry develop voluntary codes of practice for standard definitions of values-based claims such as 'natural' or 'fresh'.³⁷ This would be accompanied by a monitoring regime, and 'evidence of systemic failure to provide accurate and consistent values-based information to consumers would trigger more prescriptive modes of regulation'.³⁸

In sum, public health law has expanded into chronic disease prevention from its original focus on infectious disease control. In doing so, it has drawn upon a much broader range of regulatory instruments than in the past, including voluntary initiatives developed by industry actors, public-private partnerships and incremental, staged or 'responsive' regulatory strategies. While significant debate remains about the role of law in obesity and chronic disease prevention, it is apparent that governments possess an array of novel instruments with which to implement public health policy. This suggests that rather than relying on traditional 'command-and-control' regulation, a range of legal or regulatory strategies could be used to strengthen food advertising regulation, a theme that will be explored further in the section below on regulatory studies theory and literature.

³⁴ National Preventive Health Taskforce, 'National Preventive Health Strategy - The Roadmap for Action' (Commonwealth of Australia, 2009) 67, 125
<<http://www.preventivehealth.org.au/internet/preventivehealth/publishing.nsf/Content/national-preventive-health-strategy-11p>>. See also C Hawkes and T Lobstein, 'Regulating the Commercial Promotion of Food to Children: A Survey of Actions Worldwide' (2011) 6(2) *International Journal of Paediatric Obesity* 83, 90.

³⁵ Neal Blewett et al, 'Labelling Logic: Review of Food Labelling Law and Policy' (Australian Government, 2011) Foreword by the Chair
<<http://www.foodlabellingreview.gov.au/internet/foodlabelling/publishing.nsf/content/labelling-logic>>.

³⁶ *Ibid.*

³⁷ *Ibid.* 106.

³⁸ *Ibid.*

2. Conceptualising public health governance: the role of the state

Accompanying these changes in the practice of public health regulation is new literature conceptualising public health law, regulation and governance. Underpinning these studies is a definition of public health as '[t]he science and art of preventing disease, prolonging life and promoting health through the organised efforts of society'.³⁹ This envisages a cooperative, coordinated approach to health, involving communities, governments and other collective entities.⁴⁰ However, it also emphasises the central role of the state in public health. Governments are responsible for securing the welfare of their populations,⁴¹ and accordingly they should be held accountable for the nation's health. Under international law, the state owes an obligation to 'respect, protect and fulfil' the right to health (and related rights), as enshrined in international human rights documents.⁴² The right to health requires positive state action to promote population health, as well as forbearance to protect individual rights to property and liberty, for example.⁴³ Human rights can also provide a mandate for

³⁹ D Acheson, 'Public Health in England' (Department of Health, 1988), quoted in Department of Health, *I. What is Public Health?* (17 August 2009)

<http://webarchive.nationalarchives.gov.uk/+/www.dh.gov.uk/en/Aboutus/MinistersandDepartmentLeaders/ChiefMedicalOfficer/Features/FeaturesArchive/Browsable/DH_5017805>. This definition goes back further to CE Winslow, writing in 1920. See CE A Winslow, 'The Untilled Fields of Public Health' (1920) 51 *Science* 23, 30. The ideas underpinning the 'new public health' have a long history, but have evolved in response to new scientific knowledge, emerging threats to human health and increasing concern for human rights. See Niyi Awofeso, 'What's New About the "New Public Health"?' (2004) 94(5) *American Journal of Public Health* 705; Fran Baum, *The New Public Health* (Oxford University Press, 3rd ed, 2008).

⁴⁰ Gostin, *Public Health Law*, above n 8, 16; Lawrence O Gostin, 'Public Health, Ethics and Human Rights: A Tribute to the Late Jonathan Mann' (2001) 29(2) *The Journal of Law, Medicine and Ethics* 121, 122; James F Childress et al, 'Public Health Ethics: Mapping the Terrain' (2002) 30(2) *Journal of Law, Medicine and Ethics* 170.

⁴¹ Magnusson, above n 2, 572; Gostin, *Public Health Law*, above n 8, 8.

⁴² See *Universal Declaration of Human Rights* GA Res 217A (III) UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948) art 25; *International Covenant on Economic, Social and Cultural Rights* (ICESCR) opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 November 1976) art 12.

Disagreement exists as to the scope and nature of the right to health, i.e. whether it is a meaningful, operational and enforceable right, or merely inspirational in nature. See Gostin, 'Public Health, Ethics and Human Rights: A Tribute to the Late Jonathan Mann', above n 40, 128; John Tobin, *The Right to Health In International Law* (Oxford University Press, 2012).

⁴³ See Committee on Economic and Social Rights, *General Comment No 14: The Right to the Highest Attainable Standard of Health*, 22nd sess, Agenda Item 3, UN Doc E/C.12/2000/4 (8 November 2000) [51]. The Committee (which monitors the ICESCR) defines state obligations arising from article 12 of the ICESCR, which includes measures to discourage production, marketing and consumption of tobacco. The Committee's approach to interpreting the right to health is informed by the *Framework Convention on Tobacco Control*, which requires state level policies to reduce tobacco use. See Oscar A Cabrera and Lawrence O Gostin, 'Human Rights and the Framework Convention on Tobacco Control: Mutually Reinforcing Systems' (2011) 7(3) *International Journal of Law in Context* 285, 293.

cooperation between states to secure global health, as found in the *Framework Convention on Tobacco Control*.⁴⁴

In a report on public health ethics, the UK's Nuffield Council on Bioethics described the state's role in population health as one of 'stewardship'.⁴⁵ This encapsulates the idea that governments are stewards of the public's health, and must provide the conditions that allow people to be healthy, especially by reducing health inequalities.⁴⁶ WHO's definition also emphasises the idea of government oversight, including by 'defining the vision and direction of health policy, exerting influence through regulation and advocacy, and collecting and using information'.⁴⁷ According to the stewardship model, state intervention should:⁴⁸

- Aim to reduce the risks of ill health that people might impose on each other;
- Aim to reduce the causes of ill health by regulations that ensure the environmental conditions that sustain good health;
- Pay special attention to the health of children and other vulnerable groups;
- Promote health through the provision of information and advice, and by programs that help people overcome addictions and other unhealthy behaviours;
- Ensure appropriate access to medical services; and
- Aim to reduce health inequalities.

States possess unique powers that justify their leadership and oversight role in public health. Governments use a wide range of measures to promote health and wellbeing, including information and education as well as compulsory measures. However, only states can compel conformity with publicly established standards of conduct, or expend public funds to promote health.⁴⁹ In other words, governments can 'insist, through force of law if necessary, that individuals and businesses act in ways that do not place others at unreasonable risk of harm'.⁵⁰ While governments can draw on a range of coercive powers to safeguard the public health, these powers must be exercised legitimately within statutory and constitutional

⁴⁴ World Health Organisation, *Framework Convention on Tobacco Control*, adopted 21 May 2003 (entered into force 27 February 2005).

⁴⁵ Nuffield Council on Bioethics, 'Public Health: Ethical Issues' (Nuffield Council on Bioethics, 2007) 25-26 <<http://www.nuffieldbioethics.org/public-health>>. See also Jochelson, above n 24.

⁴⁶ K Calman, 'Beyond the "Nanny State": Stewardship and Public Health' (2009) 123 *Public Health* e6 <<http://www.sciencedirect.com/science/article/pii/S0033350608003168>>. See also Jochelson, above n 24.

⁴⁷ World Health Organisation, 'World Health Report 2000. Health Systems: Improving Performance' (World Health Organisation, 2000) 45 <http://www.who.int/whr/2000/en/whr00_en.pdf>.

⁴⁸ Nuffield Council on Bioethics, above n 45, xvii.

⁴⁹ Gostin, *Public Health Law*, above n 8, 9-10.

⁵⁰ *Ibid* 10.

constraints.⁵¹ Accordingly, literature on public health law takes on ‘the task of setting out, justifying and limiting government’s use of coercive legal powers’.⁵² In a highly influential model, Lawrence Gostin sets out a typology of government strategies for improving health.⁵³ These are the powers to:⁵⁴

- Tax and spend (for example, taxes on harmful products like tobacco and alcohol);
- Alter the informational environment (as with labelling requirements and bans on advertising);
- Design and alter the physical environment (for example, urban planning that promotes cycling and walking);
- Intervene in the economic system by addressing socio-economic disparities (through education, housing and income redistribution programs); and
- Directly regulate persons, professionals and businesses (for instance, mandating that motorcyclists wear helmets).

Gostin also recognises that the state, health authorities and private citizens can regulate health indirectly through the tort system, i.e. by mitigating the harms of hazardous products, environmental pollution or exposure to toxic substances.⁵⁵ Finally, deregulation can be a tool for public health where laws or regulations impede health-promoting activities.⁵⁶

The Nuffield Council on Bioethics describes a broad range of potential state actions, which it arranges on an ‘intervention ladder’.⁵⁷ The bottom of the ladder depicts the least intrusive step, which is for the state to do nothing, or to monitor the situation at most. The ladder moves progressively through the following options: providing information; enabling choice;

⁵¹ Ibid 10-11.

⁵² Magnusson, above n 2, 572.

⁵³ Gostin, above n 8, 28-36.

⁵⁴ Ibid. See also Lawrence O Gostin, 'Law and Ethics in Population Health' (2004) 28(1) *Australian and New Zealand Journal of Public Health* 7.

⁵⁵ Ibid 37-38.

⁵⁶ Ibid 38. Roger Magnusson builds on this model to provide a conceptual framework for law’s engagement with chronic disease. Magnusson’s model is based on six frames: the values that should inform public health laws; priority settings or targets for intervention; the form of legislative or executive action that can be taken; mechanisms for implementation, compliance and enforcement; and identifying which level of government has legislative or constitutional power to act. See Magnusson, above n 2. See also Gostin, 'Law and Ethics in Population Health', above n 54; Roger Magnusson, 'What's Law Got to Do with It? Part 1: A Framework for Obesity Prevention' (2008) 5(10) *Australia and New Zealand Health Policy* <<http://www.publish.csiro.au.ezproxy2.library.usyd.edu.au/nid/278/issue/5796.htm>>; Roger Magnusson, 'What's Law Got to Do with It? Part 2: Legal Strategies for Healthier Nutrition and Obesity Prevention' (2008) 5(11) *Australia and New Zealand Health Policy* <<http://www.publish.csiro.au.ezproxy2.library.usyd.edu.au/nid/278/issue/5796.htm>>.

⁵⁷ Nuffield Council on Bioethics, above n 45, 41-42.

guiding choice by changing the default policy; guiding choice by providing incentives or disincentives; and restricting and then finally removing choice through regulation.⁵⁸ This approach bears a close resemblance to the staged or incremental public health strategies described above, as well as responsive regulation, which I discuss below.

The Council also discusses the role of non-state actors in protecting public health, including civil society and the corporate sector.⁵⁹ Companies have responsibilities towards the public's health that extend beyond complying with relevant laws and regulations.⁶⁰ Market failure is said to occur in cases where industry fails to meet these obligations, and in doing so places population health significantly at risk.⁶¹ As described in Chapter 1, the obesity epidemic can be conceptualised as a market failure on several grounds. Arguably, it constitutes a 'negative externality', whereby the food industry outsources the costs of consuming its products onto wider society in the form of increased healthcare expenditure and lost economic productivity.⁶² Further, children are not capable of the kind of rational decision making required for participation in a free market, and fairness demands that they are protected from advertising that takes advantage of their cognitive limitations.⁶³ Evidence also suggests that self-regulation has failed to reduce children's exposure to unhealthy food advertising, and that advertising restrictions are a highly cost-effective obesity prevention measure.⁶⁴ In these circumstances there is a strong public interest argument for government regulation of unhealthy food advertising to children.⁶⁵

Evidently, there are market-based arguments for state intervention to protect children from food marketing, but the model of public health ethics found in the Nuffield report does not use economic reasoning as the primary ground for state action. Rather, it bases state intervention on evidence regarding the causes of ill health and the efficacy and effectiveness

⁵⁸ Ibid 42.

⁵⁹ Ibid 43.

⁶⁰ Ibid 146.

⁶¹ Ibid xvii.

⁶² However, the reduced life expectancy of people with obesity makes it uncertain whether healthcare costs are greater for obese individuals compared to those within a healthy weight range. Boyd A Swinburn et al, 'The Global Obesity Pandemic: Shaped by Global Drivers and Local Environments' (2011) 378(9793) *The Lancet* 804, 806; Y Claire Wang et al, 'Health and Economic Burden of the Projected Obesity Trends in the USA and the UK' (2011) 378(9793) *The Lancet* 815.

⁶³ See, e.g., Mary Story and Simone French, 'Food Advertising and Marketing Directed at Children and Adolescents in the US' (2004) 1 *International Journal of Behavioural Nutrition and Physical Activity* 3; Rob Moodie et al., 'Childhood Obesity – A Sign of Commercial Success, But a Market Failure' (2006) 1(3) *International Journal of Pediatric Obesity* 133.

⁶⁴ See, e.g., A Magnus et al, 'The Cost-Effectiveness of Removing Television Advertising of High-Fat and/or High-Sugar Food and Beverages to Australian Children' (2009) 33(10) *International Journal of Obesity* 1094.

⁶⁵ Nuffield Council on Bioethics, above n 45, xvii.

of interventions to address these causes, combined with a precautionary approach that involves a scientific assessment of risk, fairness and consistency, consideration of the costs and benefits of action, transparency and proportionality.⁶⁶ I discuss these criteria for state action in further detail below.

3. Justifying state intervention in public health

Justifications for the use of state powers is a key concern in public health law and ethics, given that government interventions often constrain individual liberties and generate economic costs.⁶⁷ The Nuffield Council's intervention ladder ranks public health policies according to their degree of intrusion on individual choice, political and public acceptability, and the level of justification required for each intervention. The higher the rung on the ladder at which the government intervenes, the stronger the justification must be.⁶⁸ The first step is an assessment and understanding of the health risk involved.⁶⁹ Intervention should be based upon 'sufficiently robust evidence to establish a causal link between a suggested risk factor and an illness or otherwise undesirable health outcome'.⁷⁰ However, perceptions of risk are socially constructed, and depend upon individual subjective views, as well as what is acceptable to communities and society as a whole.⁷¹ Accordingly, public health interventions must take into account the social values that inform public assessment of risks, as well as the relevant scientific evidence.⁷²

The determinants of chronic diseases are complex, making it difficult to establish the strength of a causal link between one specific risk factor and harm to health.⁷³ Accordingly, government intervention often takes place in the context of scientific uncertainty:⁷⁴ 'even where every reasonable step has been taken to ensure that evidence is robust, in practice it is

⁶⁶ Ibid ch 3.

⁶⁷ Gostin, *Public Health Law*, above n 8, 47.

⁶⁸ Nuffield Council on Bioethics, above n 45, xvii.

⁶⁹ Gostin, *Public Health Law*, above n 8, 55.

⁷⁰ Nuffield Council on Bioethics, above n 45, 31.

⁷¹ Ibid 34; Gostin, *Public Health Law* above n 8, 60-62; Childress et al, above n 40, 175. See also Paul Slovic, *The Perception of Risk* (Earthscan, 2000).

⁷² Gostin, *Public Health Law*, above n 8, 62.

⁷³ Nuffield Council on Bioethics, above n 45, 31. There is a large literature on the complexities of chronic disease causation and the broad range of social factors involved. See, e.g., L Moon and AM Waters, 'Socioeconomic Inequalities in Cardiovascular Disease in Australia: Current Picture and Trends Since the 1990s' (AIHW, 2006).

<<http://www.aihw.gov.au/WorkArea/DownloadAsset.aspx?id=6442453523>>; Lijun Song, 'Social Capital and Health' in William C Cockerham (ed), *Medical Sociology on the Move: New Directions in Theory* (Springer, 2013) 233.

⁷⁴ Gostin, *Public Health Law*, above n 8 56.

often incomplete or ambiguous and usually will be contested'.⁷⁵ The Nuffield Council calls for a precautionary approach, i.e. taking action to protect populations against reasonably foreseeable risks, despite incomplete evidence.⁷⁶ States must balance the need to act quickly against the possibility that measures found to be unnecessary will be seen as draconian and unjustified.⁷⁷ Accordingly, the nature or degree of uncertainty should be assessed on a case-by-case basis, as should the costs and benefits involved in different types of action.⁷⁸ Precautionary action should also be transparent – in other words '[p]ublic health agencies must be willing to make clear the bases for restrictive measures and openly acknowledge when new evidence warrants reconsideration of policies'.⁷⁹

Public health ethicists stress that governments must choose an intervention that will most effectively reduce or eliminate the risk identified.⁸⁰ It should not be assumed that public health programs will achieve their stated goals. Rather, governments have a duty to prove (through scientific evidence) that the proposed intervention is reasonably likely to achieve a public health objective.⁸¹ Governments should also demonstrate that interventions will deliver the greatest health benefit for the least cost.⁸² In addition, they should seek to minimise the burdens of interventions on human rights and freedoms.⁸³ In other words, governments must choose the least restrictive or intrusive measure that could protect the public health from the risk involved.⁸⁴ The most coercive measures should be employed only in exceptional circumstances, where less intrusive measures have failed.⁸⁵ Thus, education, information and voluntary action should precede regulation and legislation.⁸⁶ This principle is enshrined in international human rights documents. The *Siracusa Principles* permit states to infringe personal liberties to prevent public harms, so long as such measures are legal, further a

⁷⁵ Nuffield Council on Bioethics, above n 45, 33.

⁷⁶ Gostin, *Public Health Law*, above n 8, 73.

⁷⁷ *Ibid* 74.

⁷⁸ Nuffield Council on Bioethics, above n 45, 35-36. See also Gostin, *Public Health Law* above n 8, 72-74.

⁷⁹ Gostin, *Public Health Law*, above n 8, 74.

⁸⁰ *Ibid* 63. See also Childress et al, above n 40, 173.

⁸¹ Gostin, *Public Health Law*, above n 8, 63. See also Kass, above n 17, 1778-1779.

⁸² *Ibid* 64.

⁸³ *Ibid* 68.

⁸⁴ Ronald Bayer and Amy L Fairchild, 'The Genesis of Public Health Ethics' (2004) 18(6) *Bioethics* 473, 489.

⁸⁵ REG Upshur, 'Principles for the Justification of Public Health Intervention' (2002) 93(2) *Canadian Journal of Public Health* 101, 102.

⁸⁶ *Ibid*.

legitimate social objective, are proportionate to that objective, and are no more restrictive than is necessary.⁸⁷

In order to achieve a collective good, it is necessary to confer benefits and impose costs and burdens.⁸⁸ According to the dominant model of public health law and ethics,⁸⁹ for the distribution of benefits, burdens and costs to be just, governments must examine the fairness of interventions.⁹⁰ Elements of fairness include service allocation on the basis of need, imposing restrictions only where necessary to prevent a serious health risk, and avoiding under- and over-inclusive policies.⁹¹

Interventions should also be publicly justified.⁹² In a pluralistic society, opinions on the benefits and burdens of public health measures will vary.⁹³ Ethical public policy tolerates a certain level of dissent over the desirability of a particular intervention. However, there should be overall public consensus on the need for intervention.⁹⁴ This requires democratic processes for determining which public health functions governments should engage in, 'recognising that some infringements of liberty and other burdens are unavoidable'.⁹⁵ Thus, decision-making on public health law and regulation should be transparent and accountable, allowing affected parties to have equal input into the design and implementation of programs, and providing public information and justifications for proposed action.⁹⁶

⁸⁷ United Nations Economic and Social Council, *The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, 41st sess, Agenda Item 18, UN Doc E/CN.4/1985/4 (28 September 1984) [10], [15].

⁸⁸ Gostin, *Public Health Law*, above n 8, 68.

⁸⁹ Note that this section draws upon Lawrence Gostin's theory of public health law and ethics (as described in *Public Health Law*, above n 8), but there are a number of alternative approaches. For example, Lance Gable applies theories of governance to the management of public health emergencies. See Lance Gable, 'Evading Emergency: Strengthening Emergency Responses through Integrated Pluralistic Governance' (2012) 91(2) *Oregon Law Review* 374. For other examples, see Scott Burris, 'Governance, Microgovernance and Health' (2004) 77 *Temple Law Review* 335; Scott Burris et al, 'Emerging Strategies for Healthy Urban Governance' (2007) 84(1) *Journal of Urban Health* i154 <<http://link.springer.com/article/10.1007/s11524-007-9174-6>>.

⁹⁰ Gostin, *Public Health Law*, above n8, 69.

⁹¹ *Ibid.*

⁹² Bayer and Fairchild, above n 84, 489.

⁹³ Kass, above n 17, 1781.

⁹⁴ *Ibid.*

⁹⁵ *Ibid.*

⁹⁶ Upshur, above n 85, 102. See also Gostin, *Public Health Law*, above n 8, 18, 70-72; Childress et al, above n 40, 174-175; Dan M Kahan et al, 'Fear of Democracy: A Cultural Evaluation of Sunstein on Risk' in Paul Slovic (ed), *The Feeling of Risk: New Perspectives on Risk Perception* (Earthscan, 2010) 183.

4. Regulatory theory and the state's role in regulatory capitalism

Public health law touches on the design of regulatory interventions. However, regulatory studies provide a more detailed explanation of regulatory processes and forms, and so may broaden our understanding of public health regulation.

This literature also explains changes in the nature of regulation under conditions of 'regulatory capitalism'.⁹⁷ According to regulatory scholars, growing privatisation and corporatisation during the late 20th and early 21st century did not lead to the removal of the state from social and economic life; rather, increasing capitalism was accompanied and enabled by public regulation.⁹⁸ The outsourcing of state functions to the market, combined with the growth of large, multinational companies, led to heightened demand for transparent, public regulation of private activities –and also to calls for regulation of the state, whether by national and international non-state organisations, or by public agencies established as independent regulators of other branches of government.⁹⁹ At the same time, consumers, government and NGOs placed pressure on the private sector to address the social and environmental consequences of its actions, using self-regulatory instruments such as corporate social responsibility programs, internal compliance systems, industry codes of conduct and supply contracts that impose socially responsible conditions on sub-contracting companies.¹⁰⁰

The result of these trends is an increasing proliferation of regulatory institutions, tools and practices, located both within and outside the state, and increasingly blurring the boundary between private and public 'regulatory space'. While public agencies remain dominant in

⁹⁷ David Levi-Faur, 'The Global Diffusion of Regulatory Capitalism' (2005) 598 *The ANNALS of the American Academy of Political and Social Science* 12; John Braithwaite, 'The Regulatory State?' in RAW Rhodes, Sarah A Binder and Bert A Rockman (eds), *The Oxford Handbook of Political Institutions* (Oxford University Press, 2006) 407; John Braithwaite, *Regulatory Capitalism: How It Works, Ideas for Making It Work Better* (Edward Elgar, 2008); David Levi-Faur, 'Regulatory Capitalism and the Reassertion of the Public Interest' (2009) 27(3) *Policy and Society* 181. Although I focus on the scholarship of Braithwaite and others such as Julia Black, there are various approaches to conceptualising regulation and governance (i.e., the trend towards analysing modern political power in ways that move beyond a state-centred model). See, e.g., Nikolas Rose and Peter Miller, 'Political Power Beyond the State: Problematics of Government' (1992) 43(2) *The British Journal of Sociology* 173; Nikolas Rose, 'Government and Control' (2000) 40, *British Journal of Criminology* 321.

⁹⁸ See Levi-Faur, 'The Global Diffusion of Regulatory Capitalism', above n 97; Braithwaite, 'The Regulatory State?', above n 97; John Braithwaite, 'The New Regulatory State and the Transformation of Criminology' (2000) 40(2) *British Journal of Criminology* 222.

⁹⁹ Braithwaite, 'The Regulatory State?', above n 97.

¹⁰⁰ Ibid. See also, Christine Parker, *The Open Corporation: Effective Self-Regulation and Democracy* (Cambridge University Press, 2002); Ronen Shamir, 'Corporate Social Responsibility: Towards a New Market-Embedded Morality?' (2008) 9(2) *Theoretical Inquiries in Law* 371; Christine Parker and Vibeke Lehmann Nielsen, 'The Challenge of Empirical Research on Business Compliance in Regulatory Capitalism' (2009) 5 *Annual Review of Law and Social Science* 45.

some areas of regulation, theorists generally describe a ‘decentring’ of the contemporary state in regulatory processes.¹⁰¹ This expresses the idea that regulatory regimes are increasingly fragmented and complex, comprising overlapping forms of private and public regulation.

Contemporary neo-liberal ideologies favour free markets, small government and individual choice, making direct government intervention less politically attractive.¹⁰² Command-based regimes are also slow and expensive to implement, highly prescriptive and impractical to comply with, resulting in regulatory over-load.¹⁰³ Accordingly, new forms of regulation are evolving, including self-regulation, management-based regulation, and ‘multi-stakeholder standards’. The latter involve both NGOs and industry actors, and operate at national and international levels.¹⁰⁴ Thus, it can no longer be assumed that the state controls regulation. Instead, a variety of public and private actors share the tasks of developing, implementing and enforcing regulatory standards.¹⁰⁵

Self-regulation may be growing under regulatory capitalism, but it is ‘rarely detached entirely from the state’.¹⁰⁶ Contemporary self-regulation often takes the form of ‘a process whereby an organized group regulates the behaviour of its members’.¹⁰⁷ This includes via codes of conduct created by industry bodies, which apply rules of behaviour to companies within the

¹⁰¹ See, e.g., Levi-Faur, ‘The Global Diffusion of Regulatory Capitalism,’ above n 97; Braithwaite, *Regulatory Capitalism*, above n 97; Julia Black, ‘Decentring Regulation: Understanding the Role of Regulation and Self-Regulation in a “Post-Regulatory” World’ (2001) 54(1) *Current Legal Problems* 103, 128; Tim Bartley, ‘Institutional Emergence in an Era of Globalization: The Rise of Transnational Private Regulation of Labour and Environmental Conditions’ (2007) 113(2) *American Journal of Sociology* 297.

¹⁰² Black, ‘Decentring Regulation’, above n 101; Neil Gunningham, Darren Sinclair and Peter Grabosky, ‘Instruments for Environmental Protection’ in Neil Gunningham, Peter Grabosky and Darren Sinclair (eds), *Smart Regulation: Designing Environmental Policy* (Clarendon Press, 1998) 37, 50; Karen Yeung, *Securing Compliance: A Principled Approach* (Hart Publishing, 2004) 159.

¹⁰³ Gunningham, Sinclair and Grabosky, ‘Instruments for Environmental Protection’, above n 102, 44-47; Kernaghan Webb, ‘Understanding the Voluntary Codes Phenomenon’ in Kernaghan Webb (ed), *Voluntary Codes: Private Governance, the Public Interest and Innovation* (Carleton Research Unit for Innovation, Science and Environment, Carleton University, 2004) 2, 3.

¹⁰⁴ See, e.g., Benjamin Cashore, Graeme Auld and Deanna Newsom, *Governing Through Markets: Forest Certification and the Emergence of Non-State Authority* (Yale University Press, 2004); Luc W Fransen and Ans Kolk, ‘Global Rule-Setting for Business: A Critical Analysis of Multi-Stakeholder Standards’ (2007) 14(5) *Organisation* 667.

¹⁰⁵ Black, ‘Decentring Regulation’, above n 101.

¹⁰⁶ Ian Bartle and Peter Vass, ‘Self-Regulation within the Regulatory State: Towards a New Regulatory Paradigm?’ (2007) 84(5) *Public Administration* 885, 889. See also Ian Bartle and Peter Vass, ‘Self-Regulation and the Regulatory State: A Survey of Policy and Practice’ (Research Report No 17, Centre for the Study of Regulated Industries, University of Bath, 2005)

<http://lowcarbonworks.org.uk/management/cri/pubpdf/Research_Reports/17_Bartle_Vass.pdf>; Julia Black, ‘Constitutionalising Self-Regulation’ (1996) 59(1) *Modern Law Review* 24; Bryne Purchase, ‘The Political Economy of Voluntary Codes’ in Kernaghan Webb (ed), *Voluntary Codes: Private Governance, the Public Interest and Innovation* (Carleton Research Unit for Innovation, Science and Environment, Carleton University, 2004) 77, 91.

¹⁰⁷ Gunningham, Sinclair and Grabosky, ‘Instruments for Environmental Protection’, above n, 102, 50.

industry.¹⁰⁸ Industry self-regulation frequently aims to achieve social objectives, for example reducing environmental pollution or improving food quality and safety.¹⁰⁹ Because of its underlying public interest, governments often participate in, and support the development of, self-regulation, frequently drawing on it for their own purposes.¹¹⁰ Accordingly, there is a 'tangled web' of overlaps and interrelationships between the law and self-regulation.¹¹¹

Voluntary codes may provide a model for government regulation, with governments incorporating private standards into future legislation.¹¹² Self-regulation may operate in the 'shadow of the law,' as when the New Zealand government agreed to a voluntary scheme for reducing ozone depleting substances, but announced that it would introduce a broad-based carbon tax automatically if specified performance targets were not achieved by a certain date.¹¹³ Alternatively, voluntary codes may require that participants comply with relevant existing laws. In this way, codes build upon companies' legal obligations by elaborating or refining general requirements set out in legislation.¹¹⁴

Rather than thinking of self-regulation and statutory regulation as dichotomous, regulation can be conceptualised as operating along a continuum.¹¹⁵ 'Pure' self-regulation is located at one end of the continuum, and command-and-control at the other.¹¹⁶ In between the two lie various hybrids of voluntarism and command, reflecting differing levels of industry and state involvement in the development and implementation of standards.¹¹⁷ Typologies of self-regulation describe the different interactions between the state and private regulation. For

¹⁰⁸ Anil K Gupta and Lawrence J Lad, 'Industry Self-Regulation: An Economic, Organisational and Political Analysis' (1983) 8(3) *The Academy of Management Journal* 416, 417; Neil Gunningham and Joseph Rees, 'Industry Self-Regulation: An Institutional Perspective' (1997) 19(4) *Law & Policy* 363, 364. Voluntary codes also operate at the level of the individual company, or apply to industries internationally. See Webb, above n 103; Virginia Haufler, *A Public Role for the Private Sector: Industry Self-Regulation in a Global Economy* (Carnegie Endowment for International Peace, 2001).

¹⁰⁹ Webb, above n 103, 13.

¹¹⁰ *Ibid.*

¹¹¹ Kernaghan Webb and Andrew Morrison, 'The Law and Voluntary Codes: Examining the "Tangled Web"' in Kernaghan Webb (ed), *Voluntary Codes: Private Governance, the Public Interest and Innovation* (Carleton Research Unit for Innovation, Science and Environment, Carleton University, 2004) 97. See also David Cohen, 'The Role of the State in a Privatised Regulatory Environment' in Kernaghan Webb (ed), *Voluntary Codes: Private Governance, the Public Interest and Innovation* (Carleton Research Unit for Innovation, Science and Environment, Carleton University, 2004) 46.

¹¹² *Ibid.* 98.

¹¹³ Gunningham and Rees, above n 107, 401.

¹¹⁴ Webb and Morrison, above n 111. See also Webb, above n 103, 14-15.

¹¹⁵ Gunningham and Rees, above n 107, 366; Darren Sinclair, 'Self-Regulation Versus Command and Control? Beyond False Dichotomies' (1997) 19(4) *Law & Policy* 529; Taskforce on Industry Self-Regulation, 'Industry Self-Regulation in Consumer Markets' (Commonwealth of Australia, 2000) 90 <<http://archive.treasury.gov.au/contentitem.asp?ContentID=1123>>.

¹¹⁶ Sinclair, above n 115, 532.

¹¹⁷ *Ibid.* See also Black, 'Decentering Regulation,' above n 101.

example, Julia Black divides self-regulation into four categories.¹¹⁸ Voluntary or ‘pure’ self-regulation results solely from industry initiative, i.e. ‘[r]egulatory rules are self-specified, conduct is self-monitored and the rules are self-enforced; there is little or no role for the state’.¹¹⁹ In contrast, industries develop ‘coerced’ self-regulation as a direct response to the threat of statutory regulation. Sanctioned self-regulation involves a degree of government oversight, with business formulating rules that are approved by government. Under mandated self-regulation, businesses develop regulatory rules within a framework established by government, including state-specified policy objectives or goals.¹²⁰ Self-regulation and the regulatory state are often interdependent. The question then is not whether the state is involved in regulation, but to what degree and through what mechanisms.

Regulatory capitalism’s reliance upon self-regulation suggests a new role for governments. This is often described as one of ‘meta-regulation’.¹²¹ Here the state exercises limited powers of its own, and delegates regulatory tasks to non-state actors under its supervision and guidance. In other words, governments create the conditions that enable self-regulation by industry, but in a direction that furthers public policy goals determined by the state.¹²² For example, governments can provide the legislative framework that allows for industry self-regulation, or technical assistance for the creation of industry codes of conduct.¹²³ These activities are often described as the state ‘steering’ the direction of private regulation, rather than ‘rowing’, i.e. directly controlling the activities of private actors.¹²⁴ Adam Crawford describes the state’s ‘steering’ functions as:

- Determining the goals, norms and values of regulation, and conveying them to the regulated community;

¹¹⁸ Julia Black, 'Constitutionalising Self-Regulation', above n 106, 27. See also Bartle and Vass, 'Self-Regulation within the Regulatory State: Towards a New Regulatory Paradigm?' above n 106.

¹¹⁹ Bartle and Vass, 'Self-Regulation within the Regulatory State: Towards a New Regulatory Paradigm?' above n 106, 888.

¹²⁰ Black, 'Constitutionalising Self-Regulation', above n 106, 27. Mandated self-regulation may also be described as co-regulation, given that industries create self-regulation within a legislative framework.

¹²¹ See, e.g., Parker, *The Open Corporation*, above n 100; Black, 'Decentring Regulation,' above n 101; Bronwen Morgan, 'Regulating the Regulators: Meta-Regulation as a Strategy for Reinventing Government in Australia' (1999) 1(1) *Public Management* 1461; Christine Parker, 'Meta-Regulation - Legal Accountability for Corporate Social Responsibility' in Doreen McBarnet, Aurora Voiculescu and Tom Campbell (eds), *The New Corporate Accountability: Corporate Social Responsibility and the Law* (Cambridge University Press, 2007) 112; Sharon Gilad, 'It Runs in the Family: Meta-Regulation and Its Siblings' (2010) 4 *Regulation & Governance* 48.

¹²² Black, 'Decentring Regulation', above n 101.

¹²³ Purchase, above n 106, 92.

¹²⁴ David Osborne and Ted Gaebler, *Reinventing Government: How the Entrepreneurial Spirit is Transforming the Public Sector* (Plume, 1992) ch 2.

- Establishing mechanisms for checking, verifying and monitoring performance against the goals, norms and values set; and
- Designing regulatory institutions and processes that draw upon, and respond to, the capacities of actors to regulate themselves.¹²⁵

While governments may not be at the centre of regulatory processes in regulatory capitalism, they continue to perform important oversight and steering roles.¹²⁶ However, they do so by ‘adjusting, balancing, structuring, facilitating, enabling, negotiating, but never directly telling and never directly trying to control’.¹²⁷

5. Designing regulatory strategies

Self-regulation forms a key component of many contemporary regulatory schemes.¹²⁸ It is cheaper and faster to implement than government regulation, as well being more flexible and sensitive to market conditions.¹²⁹ Self-regulation draws upon the technical expertise and knowledge of industry actors, potentially leading to practical and innovative standards that companies can comply with more easily.¹³⁰ It can create ethical standards extending beyond the scope of legislation, potentially pushing companies ‘beyond compliance’ with black-letter law.¹³¹

However, critics argue that self-regulation often fails to achieve its objectives.¹³² Frequently it relies on weak standards, accompanied by mild and ineffective forms of enforcement.¹³³ Further, self-regulation represents the acquisition of power by private groups, which are not

¹²⁵ Adam Crawford, 'Networked Governance and the Post-Regulatory State? Steering, Rowing and Anchoring the Provision of Policing and Safety' (2006) 10(4) *Theoretical Criminology* 449.

¹²⁶ Bartle and Vass, 'Self-Regulation within the Regulatory State: Towards a New Regulatory Paradigm?' above n 106, 888.

¹²⁷ Black, 'Decentring Regulation', above n 101, 143.

¹²⁸ Gunningham, Sinclair and Grabosky, 'Instruments for Environmental Protection', above n 102, 50.

¹²⁹ Ibid 52; Gunningham and Rees, above n 107, 366.

¹³⁰ Gunningham, Sinclair and Grabosky, 'Instruments for Environmental Protection', above n 102, 52. See also A Ogus, 'Rethinking Self-Regulation' (1995) 15(1) *Oxford Journal of Legal Studies* 97.

¹³¹ Ibid.

¹³² Ibid; Cohen, above n 111, 54. Empirical studies examining the success of individual voluntary schemes produce mixed results. See, e.g., Andrew King and Michael Lenox, 'Industry Self-Regulation without Sanctions: The Chemical Industry's Responsible Care Program' (2000) 43(4) *The Academy of Management Journal* 698; Matthew Potoski and Aseem Prakash, 'Green Clubs and Voluntary Compliance: ISO 14001 and Firms' Regulatory Compliance' (2005) 49(2) *American Journal of Political Science* 235; S Prakash Sethi and Olga Emelianova, 'A Failed Strategy of Using Voluntary Codes of Conduct by the Global Mining Industry' (2006) 6(3) *Corporate Governance* 226.

¹³³ Gunningham, Sinclair and Grabosky, 'Instruments for Environmental Protection', above n 102, 53; Gunningham and Rees, above n 107, 370.

accountable to the body politic through traditional democratic channels.¹³⁴ Thus, consumer organisations and public interest groups view self-regulation as a cynical attempt by industry to give the appearance of regulation, thereby warding off more direct and effective forms of government regulation.¹³⁵ There are also arguments that in practice, it proves equally expensive or bureaucratically complex for the state to meta-regulate using tools such as encouraging self-regulation or contracting-out.¹³⁶

6. The theory of responsive regulation

Regulatory scholars are interested in how regulation can be designed to achieve public purposes more effectively. One prominent example is the theory of responsive regulation developed by Ayres and Braithwaite.¹³⁷ Informed by a range of theoretical perspectives, this approach calls upon regulators to be flexible and responsive, tailoring regulation to the social context of the problem at hand and taking into account industry and company motivations to comply.¹³⁸

Responsive regulation is often modelled as two complementary pyramids. The regulatory pyramid (Figure 1 below) displays the regulatory tools available to regulators, while the enforcement pyramid (Figure 2 below) presents a strategy of ‘dynamic deterrence’ achieved through the use of a mixture of enforcement measures.¹³⁹ Responsive regulation characterises regulatory and enforcement tools according to their level of flexibility or rigidity, their

¹³⁴ See Black, 'Decentering Regulation', above n 101, 138; Parker, above n 100; Colin Scott, 'Accountability in the Regulatory State' (2000) 27(1) *Journal of Law and Society* 38; Lars H Gulbrandsen, 'Accountability Arrangements in Non-State Standards Organisations: Instrumental Design and Imitation' (2008) 15(4) *Organisation* 563, 564.

¹³⁵ Neil Gunningham and Darren Sinclair, 'Designing Environmental Policy' in Neil Gunningham, Peter Grabosky and Darren Sinclair (eds), *Smart Regulation: Designing Environmental Policy* (Clarendon Press, 1998) 373, 388.

¹³⁶ See, e.g., Colin Scott, 'Speaking Softly Without Big Sticks: Meta-Regulation and Public Sector Audit' (2003) 25(3) *Law and Policy* 203; Cary Coglianese and Evan Mendelson, 'Meta-Regulation and Self-Regulation' in Robert Baldwin, Martin Cave and Martin Lodge (eds), *The Oxford Handbook of Regulation* (Oxford University Press, 2010) 146.

¹³⁷ Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Regulation Debate* (Oxford University Press, 1992). See also Braithwaite, *Regulatory Capitalism*, above n 97, ch 4; John Braithwaite, *To Punish or Persuade: Enforcement of Coal Mine Safety* (State University of New York Press, 1985); John Braithwaite, *Restorative Justice and Responsive Regulation* (Oxford University Press, 2002); John Braithwaite, 'The Essence of Responsive Regulation' (2011) 44(3) *UBC Law Review* 475. Many authors have built upon Ayres and Braithwaite's theory (most notably Braithwaite himself); however I take the authors' original model as the starting point for this discussion. For extensions of responsive regulation, see the 'smart regulation' approach proposed in Neil Gunningham, Peter Grabosky and Darren Sinclair (eds), *Smart Regulation: Designing Environmental Policy* (Clarendon Press, 1998). See also Robert Baldwin and Julia Black, 'Really Responsive Regulation' (2008) 71(1) *The Modern Law Review* 59.

¹³⁸ Braithwaite, *Restorative Justice and Responsive Regulation*, above n 137, 30.

¹³⁹ Ayres and Braithwaite, above n 137, 35-40; see also Braithwaite, *Restorative Justice and Responsive Regulation*, above n 137, ch 2.

timeliness and their reliance upon persuasion or legal coercion.¹⁴⁰ The most flexible, informal and persuasive measures form the base of both pyramids, with both regulatory tools and enforcement methods becoming increasingly coercive and punitive towards the tip of the pyramids.¹⁴¹ Responsive regulation holds that under both pyramids, regulators should take a graduated approach to regulating companies, beginning first with persuasive and informal measures, and moving to more coercive and formal controls only when industry proves unresponsive to ‘softer’ measures.¹⁴²

¹⁴⁰ Yeung, above n 102, 161-162.

¹⁴¹ Ibid; Ayres and Braithwaite, above n 137, ch 2.

¹⁴² Ibid. See also Braithwaite, *Restorative Justice and Responsive Regulation*, above n 137, 30.

Figure 1. The pyramid of regulation

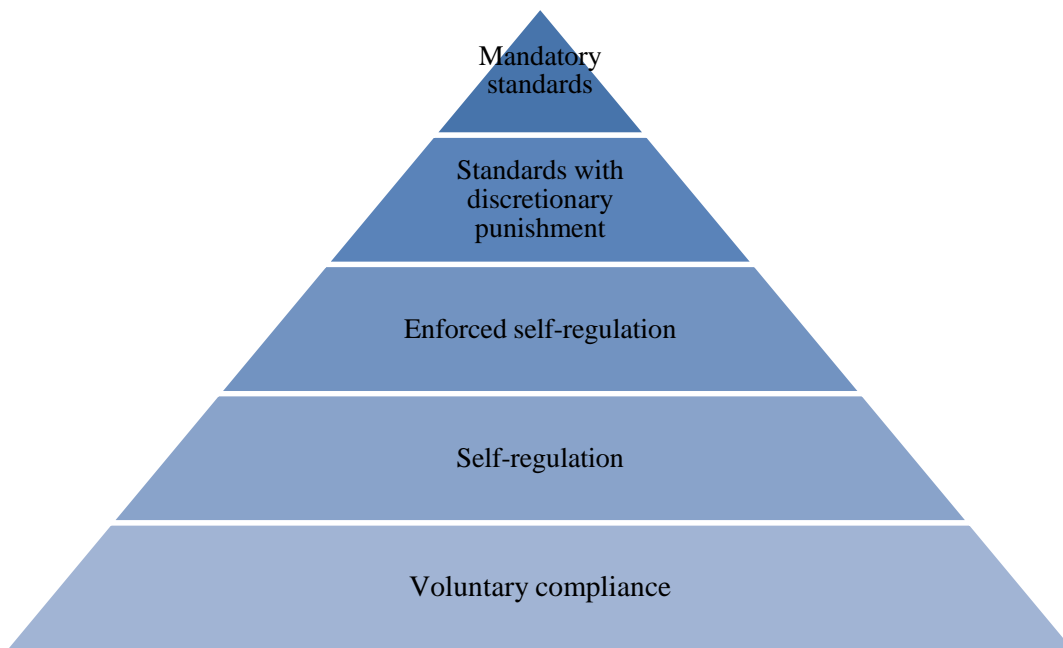
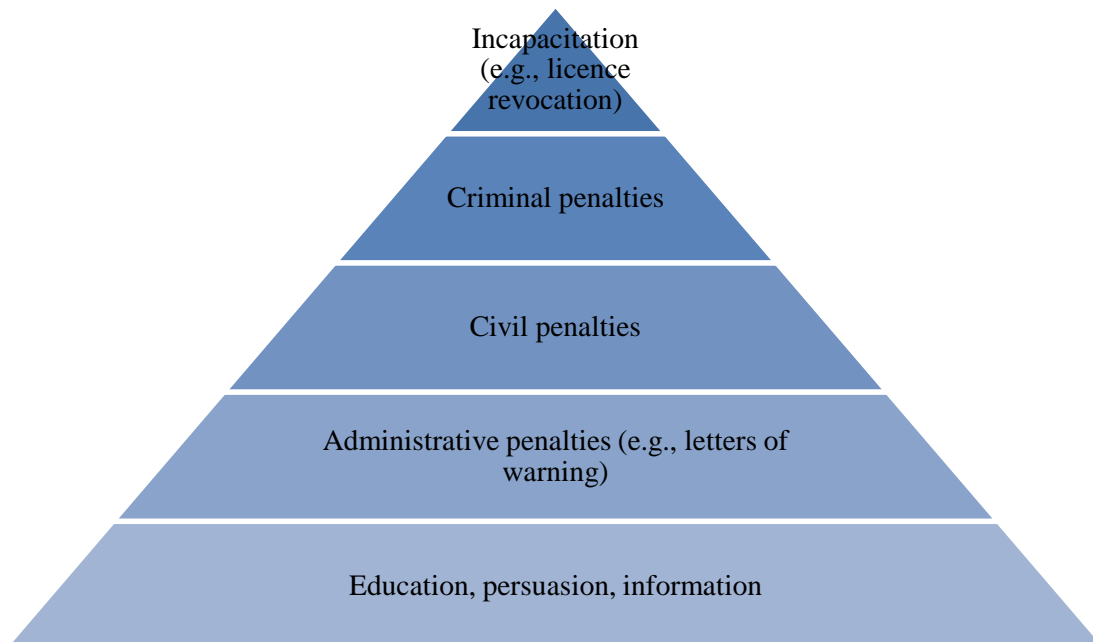


Figure 2. The pyramid of enforcement



* Adapted from Ayres and Braithwaite, above n 137.

In the past, academic and practitioner attention was largely focused on the enforcement pyramid.¹⁴³ However, government agencies are showing increasing interest in the pyramid of regulation.¹⁴⁴ The regulatory pyramid outlines the sequential introduction of regulatory tools at an industry level. Governments begin their regulatory strategy by communicating to industry that self-regulation is the preferred approach.¹⁴⁵ Where self-regulation is successful, governments refrain from further action. However, if there are unacceptable levels of non-compliance, weak self-regulatory schemes or enforcement mechanisms, states escalate up the pyramid to regulatory measures involving higher levels of intervention.¹⁴⁶ Ayres and Braithwaite suggest that states move from pure self-regulation to ‘enforced self-regulation’. This is a form of co-regulation whereby governments first require companies to set rules covering a particular practice, and then ratify and enforce those rules.¹⁴⁷ If enforced self-regulation is unworkable or ineffective, then governments may produce specific industry standards, with regulatory agencies granted the discretion to sanction breaches.¹⁴⁸ At the pyramid’s tip are command-and-control standards accompanied by the compulsory sanctioning of breaches.¹⁴⁹

A responsive approach could involve various combinations of instruments, beginning with some form of voluntary action.¹⁵⁰ ‘Smart regulation’ expands the pyramid of enforcement to include third parties (commercial and non-commercial) as well as government regulators and regulated companies. Escalation would be possible up any side of the pyramid and across several different instruments. One option is to begin with voluntary action or education, followed by the implementation of third party audits and concluding with coercive measures such as command-and-control regulation or third party foreclosure of a loan.¹⁵¹ Regardless of

¹⁴³ Yeung, above n, 102, 161; Peter Mascini, 'Why was the Enforcement Pyramid So Influential? And What Price Was Paid?' (2013) 7(1) *Regulation & Governance* 48. See, e.g., Industry Commission, 'Work, Health and Safety: An Inquiry into Occupational Health and Safety' (Commonwealth of Australia, 1995); John Watson, 'WorkCover NSW: A Regulator's Approach to Improving Safety Culture' (2008) 25(4) *Journal of Occupational Health and Safety - Australia and New Zealand* 289.

¹⁴⁴ As I described above in the context of food law and policy.

¹⁴⁵ Ayres and Braithwaite, above n 137, 38.

¹⁴⁶ *Ibid*

¹⁴⁷ Ayres and Braithwaite, above n 137, 38, ch 4; Braithwaite, *To Punish or Persuade: Enforcement of Coal Mine Safety*, above n 137. See also John Braithwaite, 'Enforced Self-Regulation: A New Strategy for Corporate Crime Control' (1982) 80(7) *Michigan Law Review* 1466.

¹⁴⁸ *Ibid*.

¹⁴⁹ Ayres and Braithwaite, above n 137, 38.

¹⁵⁰ *Ibid*.

¹⁵¹ Gunningham and Sinclair, 'Designing Environmental Policy', above n 135, 396-400. Braithwaite also envisages forms of responsive regulation that do not necessarily involve rule-making, but use other forms of supports and sanction, such as privatising markets or abolishing whole industries (see Braithwaite, 'The Essence of Responsive Regulation', above n 137, 492).

the specific measures used, governments delegating public authority to industry always do so within a framework of sustained oversight, as well as retaining the capacity and willingness to intervene if necessary.¹⁵²

Responsive regulation is also a dynamic approach ‘that expects, encourages, and sometimes requires continuous improvement’.¹⁵³ If governments make explicit the threat to move up the pyramid, then industry actors have an incentive to self-regulate in order to avoid government intervention.¹⁵⁴ Beginning with more cooperative forms of social control also gives companies the opportunity to demonstrate an ethical commitment to compliance. It then legitimates governments’ use of coercive measures when dialogue with industry fails.¹⁵⁵ However, it is the *threat* of statutory regulation that is important, rather than its actual use, and governments should introduce statutory regulation only as a measure of last resort.¹⁵⁶ Direct government intervention essentially acts as a ‘back-stop’, allowing governments to ‘regulate at a distance’ by relying on cheaper and more efficient regulatory measures.¹⁵⁷

7. Criticisms of responsive regulation

Responsive regulation seems like a promising way for governments to control powerful industries without directly intervening in their activities. However, there are some significant critiques of this approach. It may be difficult for governments to determine whether escalation up the regulatory pyramid is warranted, particularly where there is conflicting evidence of the success of self-regulation.¹⁵⁸ The complexity of political processes may affect a government’s ability to implement stronger statutory measures if self-regulation fails, creating a lag between non-compliance and more intrusive regulatory responses (and thus removing much of the power behind the threat of regulation).¹⁵⁹ Governments may also find it

¹⁵² Bartle and Vass, 'Self-Regulation within the Regulatory State: Towards a New Regulatory Paradigm?' above n 106, 890.

¹⁵³ Braithwaite, 'The Essence of Responsive Regulation,' above n 137, 502.

¹⁵⁴ Ayres and Braithwaite, above n 137, 38-39; Braithwaite, *Restorative Justice and Responsive Regulation*, above n 137, 32-34; Neil Gunningham, 'Codes of Practice: The Australian Experience' in Kernaghan Webb (ed), *Voluntary Codes: Private Governance, the Public Interest and Innovation* (Carleton Research Unit for Innovation, Science and Environment, Carleton University, 2004) 317, 319.

¹⁵⁵ Braithwaite, *Restorative Justice and Responsive Regulation*, above n 137, 31-34.

¹⁵⁶ Ayres and Braithwaite, above n 137, 47-49; Braithwaite, *Restorative Justice and Responsive Regulation*, above n 137, 35-36.

¹⁵⁷ Gunningham and Sinclair, 'Designing Environmental Policy', above n 135, 448.

¹⁵⁸ Baldwin and Black, above n 128, 63.

¹⁵⁹ See, e.g., Colin Scott, 'The Proceduralisation of Telecommunications Law' (1998) 22(3) *Telecommunications Policy* 243. See also Cohen, above n 111, 51.

problematic to introduce coercive forms of regulation once they have built a cooperative relationship with industry, as required by measures at the base of the regulatory pyramid.¹⁶⁰

Sometimes it may be inappropriate to begin regulatory strategies with self-regulation. Australian governments maintain statutory controls on food safety because it poses a direct and immediate threat to public health.¹⁶¹ Critical health risks appear to over-ride the presumption of self-regulation,¹⁶² yet responsive regulation argues that governments should begin at the base of the pyramid of regulation even for serious matters.¹⁶³ However, in this case a responsive approach would not be proportionate to the objective to be achieved and the necessity for intervention.¹⁶⁴

A second, more fundamental critique of responsive regulation is that it separates the technical features of regulation from its normative or moral concerns.¹⁶⁵ Although situated within the theories of republicanism and restorative justice (particularly in later versions), responsive regulation is sometimes interpreted simply as a technical prescription.¹⁶⁶ Often, regulatory literature claims to be theory- and value-neutral, particularly in light of the shift away from what have been called 'substantively rational' forms of law, to those described as procedural, reflexive, or responsive.¹⁶⁷ According to Black, the former is designed to operate in concrete situations, achieving specific regulatory goals through the use of detailed prescriptions for social behaviour. The latter induces regulatory ends indirectly, rather than commanding them.¹⁶⁸ Consequently, it moves away from considering the substantive content of regulatory regimes. The result is that regulatory studies often focus on the implementation of regulation at the expense of the values or ends that are being pursued, how these should be defined, and

¹⁶⁰ Fiona Haines makes a similar critique of the pyramid of enforcement. See Fiona Haines, *Corporate Regulation: Beyond 'Punish or Persuade'* (Clarendon Press, 1997) 219-221. See also Baldwin and Black, above n 137, 62.

¹⁶¹ Blewett et al, above n 35, 41.

¹⁶² Australian Government, 'Best Practice Regulation Handbook' (Australian Government, 2011) 34 <<http://www.finance.gov.au/obpr/proposal/gov-requirements.html>>.

¹⁶³ However, responsive regulation also acknowledges that going straight to the pyramid's tip will be justified in circumstances of extreme urgency. See Braithwaite, 'The Essence of Responsive Regulation', above n 137, 492-493.

¹⁶⁴ Yeung, above n 102, 168-170. See also Baldwin and Black, above n 137, 62-63.

¹⁶⁵ Peter Vincent-Jones, 'Values and Purpose in Government: Central-Local Relations in Regulatory Perspective' (2002) 29(1) *Journal of Law and Society* 27, 34. See also Black, 'Constitutionalising Self-Regulation', above n 106; Julia Black, 'Proceduralising Regulation: Part 1' (2000) 20(4) *Oxford Journal of Legal Studies* 597.

¹⁶⁶ Mascini, above n 143, 55. See also Yeung, above n 102, 170.

¹⁶⁷ Black, 'Proceduralising Regulation: Part I', above n 165. See also Gilad, above n 121; Gunther Teubner, 'Substantive and Reflexive Elements in Modern Law' (1983) 17(2) *Law and Society Review* 239.

¹⁶⁸ *Ibid.* For example, process-based regulation sets out procedures and organisational designs to be used by companies in meeting regulatory goals, rather than specifying the exact means of compliance. See Christine Parker, 'Reinventing Regulation within the Corporation: Compliance-Oriented Regulatory Innovation' (2000) 32(5) *Administration & Society* 359.

by whom.¹⁶⁹ Some strategies assume that regulatory design takes place when governments have already determined regulatory goals, meaning that policy makers do not need to consider the substantive objectives of regulation.¹⁷⁰ However, this approach does not assist regulators when there is heated debate over what the goals of regulation should be, and how they might be pursued.

Further, a focus on regulatory design does not truly result in a separation of value-concerns from the technical details of regulation. Instead, it leaves normative considerations unexamined and unjustified. It could be argued that responsive regulation (as it is commonly interpreted) emphasises cost-effectiveness and regulatory efficiency. As such, it mirrors the trend towards the 'rationalisation' of state activities, associated with neo-liberal forms of government.¹⁷¹ Rationalisation involves an approach to policymaking, organisational management and the distribution of resources in public governance that is influenced by objective, positivist scientific knowledge.¹⁷² Public administrative principles are increasingly based in economic theory, where the ultimate desired outcome is (economic) efficiency and accountability. This theoretical position also accepts that the separation of means and ends, and facts from values, is possible and indeed desirable.¹⁷³ Hence the attempt by literature on regulation to detach regulatory processes from a particular political ideology and from specific substantive ends. Regulatory studies can also superficially 'depoliticise' pressing public health, labour and environmental issues.¹⁷⁴ It presents them as technical matters that can be resolved by the application of neutral expertise, market forces and management techniques.¹⁷⁵ In doing so, it allows existing inequalities and systemic issues to continue, without requiring fundamental changes to the economic institutions and practices that create them.¹⁷⁶

¹⁶⁹ Black, 'Proceduralising Regulation: Part 1', above n 165, 598. See also Yeung, above n 102, 162.

¹⁷⁰ See Gunningham and Sinclair, 'Designing Environmental Policy', above n 135, 377. However, the authors discuss the need to identify the goals of regulation as an important first step and to consider the priority given to the efficiency, effectiveness and equity of regulatory instruments that could address the goal (pp 380-381).

¹⁷¹ Mascini, above n 143, 55-56. See Michael Pusey, *Economic Rationalism in Canberra: A Nation-Building State Changes Its Mind* (Cambridge University, 1992); Robert Gregory, 'New Public Management and the Ghost of Max Weber: Exorcised or Still Haunting?' in T Christensen and P Laegreid (eds), *Transcending New Public Management: the Transformation of Public Sector Reforms* (Ashgate, 2007) 221.

¹⁷² Toni Schofield, 'Gendered Organisational Dynamics: The Elephant in the Room for Australian Allied Health Workforce Policy and Planning?' (2009) 45(4) *Journal of Sociology* 383, 388.

¹⁷³ Gregory, above n 171.

¹⁷⁴ Webb, above n 103, 14; Mascini, above n 143, 56; Stepan Wood, 'Green Revolution or Greenwash? Voluntary Environmental Standards, Public Law and Private Authority in Canada' in Law Commission of Australia (ed), *New Perspectives on the Public-Private Divide* (UBC Press, 2003) 123.

¹⁷⁵ Wood, above n 174, 140.

¹⁷⁶ Webb, above n 103, 14; Wood, above n 174, 143.

8. Addressing the criticisms of responsive regulation

New developments in regulatory theory address these criticisms by drawing regulatory techniques and public purpose more closely together. The dominant conception of responsive regulation conceptualises ‘responsiveness’ as regulation tailored to the characteristics of specific industries and individual companies. This includes (under Ayres and Braithwaite’s model of responsiveness) an industry’s willingness and capacity to comply with regulation, and the extent to which companies cooperate with regulatory agencies.¹⁷⁷ It can also include the nature of the regulatory problem to be addressed and the policy objectives to be achieved; the broader institutional outcomes of the regulatory regime; the different logics of regulatory tools and strategies; the regime’s performance; and changes in each of these elements, as well as the broader social and economic context of regulation.¹⁷⁸ Yet as discussed above, the primary focus of this form of responsive regulation is on regulatory techniques and strategies, rather than the social values and ethical concerns that underpin regulatory regimes.

Nonet and Selznick offer an alternative idea of responsive regulation, as law that is responsive to social needs.¹⁷⁹ Regulation should adapt to changing social pressures and demands, and should have at its heart the advancement of particular social values.¹⁸⁰ Vincent-Jones draws upon Nonet and Selznick’s account to argue that the idea of responsiveness needs to be more closely connected with the values informing regulatory design and implementation. This in turn necessitates consideration of the state’s purpose and role in society, as well as of the actors involved in policy design and implementation. According to Vincent-Jones, the law should be conceptualised as responding to some form of public interest or common good, including social as well as economic purposes. Thus the state’s regulatory role can be described as ‘the systematic exercise of control for the pursuit of public purpose’.¹⁸¹

In order to determine the public interest that regulation should pursue, regulatory structures should enable participation by a range of stakeholders.¹⁸² This approach is based on the

¹⁷⁷ See Ayres and Braithwaite, above n 137.

¹⁷⁸ See Baldwin and Black, above n 137.

¹⁷⁹ Philippe Nonet and Philip Selznick, *Law and Society in Transition: Toward Responsive Law* (Transaction Publishers, 4th ed, 2008).

¹⁸⁰ *Ibid* ch 4.

¹⁸¹ Vincent-Jones, above n 165, 37.

¹⁸² See e.g., Parker, *The Open Corporation*, above n 100, 38-39; Gulbrandsen, above n 134; Black ‘Proceduralising Regulation: Part I’, above n 157; Julia Black, ‘Proceduralising Regulation: Part II’ (2001) 21(1) *Oxford Journal of Legal Studies* 33; Julia Black, ‘Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes’ (2008) 2(2) *Regulation & Governance* 137. See also Braithwaite’s

concept of deliberative democracy, meaning ‘a polity where decisions are made on the basis of dialogue and public justification accessible to all citizens’.¹⁸³ Accordingly, the substantive content of regulatory norms should be determined by modes of decision-making involving participation and deliberation by all affected parties, which Black refers to as ‘proceduralisation’.¹⁸⁴ Proceduralisation is both a form of law and a way of legitimating the use of law in a pluralistic society, where there is significant debate over what the right ends of law should be.¹⁸⁵ Law is valid to the extent that certain procedures are followed in its creation, rather than because it pursues particular moral or ethical goals.¹⁸⁶ It implies that regulation should contain mechanisms that facilitate external stakeholder scrutiny of and input into the scheme, for example public disclosure of information about its operation, and the incorporation of external representation on administrative bodies.¹⁸⁷ Such procedures are more likely to produce regulation that reflects broad community consensus¹⁸⁸ and is legitimate in the eyes of the public, and therefore more politically acceptable.¹⁸⁹

There are also practical benefits to involving external third parties in regulatory processes. Ayres and Braithwaite refer to the idea of ‘tripartism’.¹⁹⁰ Here, public interest groups participate in regulatory enforcement in order to provide a check on the power of large companies, and to prevent ‘capture’ of regulatory agencies by corporate actors.¹⁹¹ Governments can also enrol commercial parties in monitoring and sanctioning activities.¹⁹² Larger companies use their market power to impose product and process conditions on

commentary on democratic theory and restorative justice in Braithwaite, *Restorative Justice and Responsive Regulation*, above n 137, 130-136.

¹⁸³ Parker, *The Open Corporation*, above n 100, 37.

¹⁸⁴ Black, ‘Proceduralising Regulation: Part 1’, above n 165.

¹⁸⁵ Ibid; Nick J Fox and Katie J Ward, ‘What Governs Governance, and How Does It Evolve? The Sociology of Governance-In-Action’ (2008) 59(3) *The British Journal of Sociology* 519, 526.

¹⁸⁶ For Black, processes of discourse must meet the criteria contained in Habermas’ discourse principle, namely that participation is un-coerced, discourse is free from domination and participants recognise the right of others to express their views, with the corollary obligation that such views are rational and capable of being understood. See Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (MIT Press, 1996) 296-7, cited in Black, ‘Proceduralising Regulation: Part 1’, above n 165, 612. See also Black, ‘Proceduralising Regulation: Part II’, above n 182, 46.

¹⁸⁷ See, e.g., Bartle and Vass, ‘Self-Regulation within the Regulatory State: Towards a New Regulatory Paradigm?’ above n 106, 898-899; Robert Baldwin, Martin Cave and Martin Lodge, *Understanding Regulation: Theory, Strategy and Practice* (Oxford University Press, 2nd ed, 2011) 352; Neil Gunningham and Darren Sinclair, *Leaders and Laggards: Next-Generation Environmental Regulation* (GreenLeaf, 2002) 145-147.

¹⁸⁸ Black, ‘Proceduralising Regulation: Part 1’, above n 165.

¹⁸⁹ Gunningham and Sinclair, ‘Designing Environmental Policy’, above n 135, 386. See also Magnus Bostrom, ‘Regulatory Credibility and Authority through Inclusiveness: Standardisation Organisations in Cases of Eco-Labeling’ (2006) 13(3) *Organisation* 345.

¹⁹⁰ Ayres and Braithwaite, above n 137, ch 3.

¹⁹¹ Ibid.

¹⁹² Braithwaite, *Regulatory Capitalism*, above n 97, ch 4; Peter Grabosky, Neil Gunningham and Darren Sinclair, ‘Parties, Roles and Interactions’ in Neil Gunningham, Peter Grabosky and Darren Sinclair (eds), *Smart Regulation: Designing Environmental Policy* (Clarendon Press, 1998) 93.

smaller ‘up-stream’ supplier companies.¹⁹³ For example, large supermarket chains often require suppliers to comply with voluntary standards on food quality and safety.¹⁹⁴ Governments can harness the power of commercial third parties by facilitating their participation in regulatory processes, thereby enhancing both the legitimacy and effectiveness of regulation.¹⁹⁵ Braithwaite refers to this idea as ‘networked governance’. Rather than escalate to more intrusive forms of government control, state regulators strengthen regulation by enlisting commercial actors and NGOs as regulatory partners.¹⁹⁶

Building on this argument, I suggest a connection between the public purpose of regulation, the degree of external stakeholder participation, and the regulatory tool used. In other words, the stronger the public interest underpinning the scheme, the greater the need for external stakeholder participation in regulatory processes, as well as the use of legal power and/or legislative backing.¹⁹⁷ This requires a multi-dimensional scheme that addresses both the form of regulation (regulatory technique) and its function (or objective).¹⁹⁸ In relation to the form of regulation, important questions to be answered are: who regulates; who is regulated and by what means; and how are they organized? The question of ‘who regulates’ can be broken down into different components: what entity initially called for regulation, and in what form? Who specifies the regulatory rules and codes, and how are they specified? Who enforces regulation, monitors the conduct of the regulated and through what mechanisms? What institutional arrangements are in place to administer the regulatory regime?¹⁹⁹ In short, good governance calls for close attention to the design of regulatory systems, but with close reference to the public policy objective to be achieved.

¹⁹³ Braithwaite, ‘The Regulatory State?’ above n 97, 422; Gunningham, Sinclair and Grabosky, ‘Instruments for Environmental Protection’, above n 102, 109; Peter Grabosky, ‘Beyond Responsive Regulation: The Expanding Role of Non-State Actors in the Regulatory Process’ (2013) 7(1) *Regulation & Governance* 114, 116.

¹⁹⁴ Fuchs, Kalfagianni and Havinga, above n 33, 354.

¹⁹⁵ Gunningham and Sinclair, ‘Designing Environmental Policy’, above n 135, 411; Gunningham and Sinclair, *Leaders and Laggards*, above n 187, 152-144; Peter Grabosky, ‘Using Non-Governmental Resources to Foster Regulatory Compliance’ (1995) 8(4) *Governance* 527.

¹⁹⁶ Braithwaite, *Regulatory Capitalism*, above n 97, 94-100; Braithwaite ‘The Essence of Responsive Regulation’, above n 137, 507-510. Smart regulation also takes a similar approach: see Gunningham, Grabosky and Sinclair, above n 137.

¹⁹⁷ This argument draws upon Bartle and Vass’s discussion of self-regulation’s dimensions, found in Bartle and Vass, ‘Self-Regulation and the Regulatory State: A Survey of Policy and Practice’, above n 106, 24-29. The authors note that regulation does not always work this way in practice. For example, regulatory schemes with a significant public interest component may rely heavily on self-regulation, as is the case with some aspects of medical registration (pp 26-27). See also Bartle and Vass, ‘Self-Regulation within the Regulatory State: Towards a New Regulatory Paradigm?’ above n 106, 898; Taskforce on Industry Self-Regulation, above n 115, 91.

¹⁹⁸ Bartle and Vass, ‘Self-Regulation and the Regulatory State: A Survey of Policy and Practice’, above n 106, 26.

¹⁹⁹ *Ibid* 28.

9. Conclusion

There are significant areas of overlap between public health law and regulatory studies. Most importantly, both stress the central role of the state in regulation and policy, although that role may be evolving into one of ‘meta-regulation’, leadership, or oversight. There is also a strong utilitarian basis to both schools of thought, i.e. that state action must only be used to achieve social objectives and to produce the greatest benefit for the largest number of people. Both value the principle of ‘minimal sufficiency’: that governments should use the least intrusive measure that will effectively achieve their objectives. Both call for governments to trial less intrusive measures before introducing legislative or coercive interventions. Finally, the idea of procedural fairness is common to both public health ethics and law, and regulatory theory. It implies that external stakeholders should be included in decision-making on the scope and nature of regulatory interventions, so as to improve the transparency and accountability of regulatory processes.

By drawing together these two literatures – regulatory studies and public health law – we can build a theoretical framework that uses the fundamental concepts of responsive regulation, but which also engages with the ethical and moral dimensions of public health. Public health ethics is particularly useful in this regard because it has a strong social justice component, and considers issues of poverty, injustice and inequality. Like public health itself, public health law and regulation is explicitly normative, whereas regulatory theory tends to focus on the technical and design features of regulation. Accordingly, I use theorising on public health law to give regulatory theory a substantive and moral context. Public health ethics also provides in-depth reasoning on the justifications for state action, adding further dimensions to the idea of regulation’s ‘responsiveness’ to its social context. It suggests that governments must respond to the degree of risk involved, evidence on the success of interventions, and the benefits and burdens that regulation would impose on the community. Thus, a responsive approach to public health regulation can be based on the following assumptions:

- Law and regulation (including self-regulation) should be motivated by an explicit social objective that is related to improving health and wellbeing;
- Governments play a unique leadership role in public health regulation (although one that does not necessarily entail statutory regulation), as they are responsible for securing public health and the public interest more broadly;

- States should begin regulation with the least intrusive measure, but reserve the right to introduce more stringent controls where consent-based measures fail;
- Voluntary and self-regulatory measures should operate within a framework of government monitoring, evaluation and oversight;
- States should consider introducing complementary combinations of regulatory instruments, for example self-regulation operating within legislative ‘scaffolding’;²⁰⁰ and
- Regulatory processes should incorporate a broad range of parties affected by regulation or with an interest in its outcome, for example public health organisations, consumer groups and other non-government actors.

This theoretical approach can guide new forms of public health governance that involve voluntary action by industry and take an incremental approach to state intervention. It grants the government a central role in public health, while also acknowledging the constraints on direct state action. In the next chapter I turn this framework into a concrete set of measures by which to evaluate regulatory regimes that begin with voluntary industry action. Analysing self-regulation is the first step in a responsive regulatory approach, as the failure of self-regulation justifies government escalation to more coercive forms of regulation.

²⁰⁰ Roger S Magnusson and Belinda H Reeve, 'Regulation and the Prevention Agenda' (2013) 199(2) *Medical Journal of Australia* 89.

CHAPTER 4

Assessing the effects of self-regulation

This chapter describes studies that evaluate the effects of self-regulation on Australian television food advertising. This research comprises studies performed by the food industry; studies conducted by public health researchers; and reviews of the evidence by government agencies. Table 7 summarises the methodologies and main findings from studies by the first two groups. After describing limitations in existing research on the RCMI and QSRI, I propose a different approach to assessing the efficacy of the codes. Accordingly, the second part of the chapter translates the theory of responsive regulation into practical measures for evaluating regulatory regimes that rely upon voluntary industry action. I describe some of the key determinants of successful self-regulation, with a focus on the design features and institutional supports that are required if private regulation is to advance public policy objectives. My overall goal is to create a detailed framework for assessing whether the RCMI and QSRI contain the building blocks of a successful self-regulatory regime. This chapter focuses on research that analyses the outcomes of the codes in terms of their impact upon children's exposure to unhealthy food advertising. A number of other studies critique the terms and conditions of the RCMI and QSRI, the regulatory processes established by food industry self-regulation, and the extent of compliance with the two initiatives.¹ I weave the findings of these studies into my substantive analysis of the codes in Chapters 6 to 11, so they will not be discussed in detail here.

¹ See Lana Hebden et al, 'Industry Self-Regulation of Food Marketing to Children: Reading the Fine Print' (2010) 21(3) *Health Promotion Journal of Australia* 229; Lana Hebden et al, 'Regulating the Types of Foods and Beverages Marketed to Australian Children: How Useful are Food Industry Commitments?' (2010) 67(4) *Nutrition & Dietetics* 258; Michele Roberts et al, 'Compliance with Children's Television Food Advertising Regulations in Australia' (2012) 12(1) *BMC Public Health* 846; J Lumley, J Martin and N Antonopoulos, 'Exposing the Charade: The Failure to Protect Children from Unhealthy Food Advertising' (Obesity Policy Coalition, 2012) <<http://www.opc.org.au/paper.aspx?ID=exposing-the-charade&Type=policydocuments>>; L Wallard et al, 'The Takeaway on Fast-Food Meals: A Summary of Three Fast-Food Studies in Australia' (Cancer Council NSW, 2012) <<http://www.cancerCouncil.com.au/68145/news-media/latest-news-news-media/cc-news/fast-food-exposing-the-truth/?pp=68145>>.

Table 7. Industry and public health studies of the RCMI and QSRI's effects on television advertising of unhealthy food to children

Author	Date	Code	Television advertising data used	Included programming	Coding of advertised products	Main findings
AFGC	2010	RCMI	March -May 2010. Ads broadcast in 5 Australian state capital cities.	C and P programs, those where >50% of the audience is children or theme, visuals, images are directed to children.	Signatories' products classified according to nutrition criteria specified by them. Australian Guide to Healthy Eating/NSW Health Canteen Strategy used for non-members' products.	Unhealthy food advertising represents 2.4% of total food and beverage advertising in children's programs.
AFGC	2012	RCMI QSRI	14 days in March 2011. Ads on 8 channels in 5 Australian state capital cities.	C and P programs, those where >50% of audience is children or theme, visuals, images are directed to children.	Advertised foods classified as unhealthy/healthy using the Australian Guide to Healthy Eating.	Unhealthy food advertising represents 1.6% of all food advertising during children's programs, a 1.4% decrease from 2010.
King et al	2010	RCMI	7 days in May 2006 and May 2007, 4 days in May 2009. Ads on 3 Sydney free-to-air channels.	Times when no. of children watching was >25% of the maximum child audience for the day.	Advertised foods classified as healthy/unhealthy according to the Australian Guide to Healthy Eating.	RCMI participants reduced unhealthy food advertising during children's peak viewing times more than non-members but most food advertising still for unhealthy products.
Hebden et al	2011	QSRI	4 days in May 2009, April 2010. Ads broadcast on 3 Sydney free-to-air television channels.	Times when no. of children watching was >25% of the maximum child audience for the day.	Advertised products classified as healthy/unhealthy/fast-foods according to Australian Guide to Healthy Eating. Fast-food ads categorised according to nutritional quality, advertising company and type of product.	QSRI participants reduced unhealthy food advertising during peak viewing times less than non-members. Children's exposure to unhealthy fast-food adverts remained the same over the study period.
King et al	2012	RCMI QSRI	7 days in May 2006, May 2007, 4 days in May 2009, April 2010, May 2011. Ads on 3 Sydney free-to-air television channels.	Children's peak viewing times identified as: weekdays, 6am-9am and 4pm-9pm; weekends, 6am-12pm and 4pm-9pm.	Advertised products classified as healthy/unhealthy based on Australian Guide to Healthy Eating. Fast-food advertisements coded as unhealthy/healthy/brand advertising and according to advertising company.	Unhealthy food advertising declined prior to the initiatives, but fast-food advertising increased. Children still exposed to high levels of unhealthy food advertising in peak viewing times.
Brindal et al	2011	RCMI QSRI	6, 4 day study periods during 2008-2010. Ads on 5 free-to-air channels and 5 pay TV channels in Adelaide and Whyalla.	Times when no. of children watching is >35% of the maximum daily child audience. For pay TV: times when no. of children watching was >75% of the maximum daily child audience rating.	Food advertisements coded as healthy/ unhealthy as well as according to advertiser, brand owner, persuasive techniques used.	Unhealthy food advertising was infrequent in children's programs but common during peak viewing times. Code signatories advertised unhealthy products more than non-signatories. No change in advertising rate by RCMI signatories and increase in advertising by QSRI participants.

1. Food industry studies evaluating the RCMI and QSRI

As part of its management of the food industry codes, the Australian Food and Grocery Council (AFGC) monitored television food advertising in 2010 and 2011.² Its research aimed to describe unhealthy food advertising directed to children, and the proportion of this advertising by code signatories. In a 2010 study the AFGC identified 410 individual food advertisements, which were broadcast approximately 80,000 times during the study period. Of the 410 unique advertisements, 160 were shown at least once during children's programs.³ Of the latter figure, 33 advertisements were for unhealthy products. Almost two-thirds of these unhealthy food advertisements (20) were from RCMI signatories. The AFGC also examined the creative content and frequency of unhealthy food advertisements that appeared in children's programs. It identified a number of advertisements that it considered were not targeted at children, either because they screened only a few times during children's programs, or because the content of the advertisement itself was not targeted to children. Of the unhealthy food advertisements appearing in children's programs and directly targeting children, only three were by signatory companies.⁴ The AFGC concluded that only 2.4 per cent of total food advertising was for unhealthy products and directly targeted children.⁵

A second study evaluated food advertising during 14 days of free-to-air television in March 2011, across eight television channels.⁶ It found that of all food and beverage advertising that screened across these channels, three per cent was shown during children's programs and was for unhealthy foods.⁷ This represented a 1.6 per cent decrease in unhealthy food advertising during children's programming compared to 2010. Unhealthy food advertising during children's programs comprised 0.7 per cent of all food and beverage advertising on the three main television channels. This figure had decreased by 1.7 per cent compared to 2010 (where it was 2.4 per cent). These decreases occurred despite a significant increase in the total amount of food advertising that screened during this period.⁸ Based on the low rate of food

² Australian Food and Grocery Council, *Food and Beverage Advertising to Children: Activity Report* (December 2010) <<http://www.afgc.org.au/industry-codes/advertising-kids/rcmi-reports-2009.html>>; Australian Food and Grocery Council, *Food and Beverage Advertising to Children: Activity Report* (May 2012) <<http://www.afgc.org.au/industry-codes/advertising-to-children/rcmi/rcmi-reports-2009.html>>. At the time of writing the industry had not released a monitoring report on food advertising directed to children in 2012.

³ Australian Food and Grocery Council, *Food and Beverage Advertising to Children: Activity Report* (2010), above n 2.

⁴ *Ibid* 9.

⁵ *Ibid*.

⁶ Australian Food and Grocery Council, *Food and Beverage Advertising to Children: Activity Report* (2012), above n 2, 6.

⁷ *Ibid* 8.

⁸ *Ibid*.

advertising during children's programming, the AFGC said that, 'Australian children are exposed to very low levels of non-core [unhealthy] food and beverage advertising on television...'⁹ Also, it argued that the decrease in unhealthy food advertising directed to children could show that the RCMI and QSRI were having a positive impact on food advertising to children.¹⁰

These findings should be interpreted in light of significant limitations in the AFGC's methodology. In the 2010 report, the AFGC classified food products differently according to whether or not the advertiser was a signatory to the RCMI. This created discrepancies in the classification of products from the two groups of companies.¹¹ It also reported on the number of unique advertisements for unhealthy products that were directed to children, but not the frequency with which they were broadcast.¹² By design, therefore, the study could not quantify the extent of children's exposure to unhealthy food advertising. The AFGC also defined children's programs based on a mixture of classification information and audience share data, rather than according to children's peak viewing times.¹³ Yet data on children's television viewing suggests that few or no programs have an audience share of 50 per cent or more children.¹⁴ The AFGC further narrowed the scope of the study by only including advertisements that it subjectively evaluated as targeting children.¹⁵ This excluded advertising directed to children but broadcast in general audience programs, as well as advertising that appeared in children's programs but which appealed to a general audience.¹⁶ The AFGC's

⁹ Ibid 10.

¹⁰ Ibid.

¹¹ Lisa G Smithers, John W Lynch and Tracy Merlin, 'Television Marketing of Unhealthy Food and Beverages to Children in Australia: A Review of Published Evidence from 2009' (Australian National Preventive Health Agency, 2012) 12 <<http://www.anpha.gov.au/internet/anpha/publishing.nsf/Content/publications>>.

¹² Ibid 20; Australian Communications and Media Authority, 'Industry Self-Regulation of Children's Food and Beverage Advertising: ACMA Monitoring Report' (Australian Government, 2011) 24

<<http://engage.acma.gov.au/kids-food-ads/>>; Lesley King et al, 'Building the Case for Independent Monitoring of Food Advertising on Australian Television' (2012) (*FirstView* Article) *Public Health Nutrition* 1, 5 <<http://journals.cambridge.org/action/displayAbstract?fromPage=online&aid=8706977>>.

¹³ Smithers, Lynch and Merlin, above n 11, 11.

¹⁴ Australian Communications and Media Authority, 'Children's Viewing Patterns on Commercial, Free-to-Air and Subscription Television: Report Analysing Audience and Ratings Data for 2001, 2005 and 2006' (Australian Government, 2007)

<http://www.acma.gov.au/webwr/_assets/main/lib310132/children_viewing_patterns_commercial_free-to-air_subscription_television.pdf>, cited in Smithers, Lynch and Merlin, above n 11, 11.

¹⁵ Australian Communications and Media Authority, 'Industry Self-Regulation of Children's Food and Beverage Advertising: ACMA Monitoring Report', above n 12, 20.

¹⁶ Ibid 24.

study seems designed not to capture all of the relevant information and as such, it presents a wholly distorted picture of children's exposure to unhealthy food advertising on television.¹⁷

2. Public health research on the effects of the codes

The main independent research on the RCMI and QSRI has been conducted by members of the Physical Activity Nutrition Obesity Research Group at the University of Sydney in collaboration with Cancer Council NSW. These researchers have undertaken three studies that attempt to quantify the impact of self-regulation on unhealthy food advertising to children.¹⁸

The first study compared food advertisements by RCMI signatories and non-signatories, broadcast in May 2006, 2007 and 2009.¹⁹ It found that food advertising fell by 35 per cent between 2006 and 2009, although the volume of unhealthy food advertising remained relatively stable. Compared with other companies, RCMI participants reduced the amount of unhealthy food advertising they screened, including in children's peak viewing periods (from 1.8 advertisements per hour in 2007 to 1.5 in 2009).²⁰ However, the majority of all food advertising continued to be for unhealthy products.²¹ The data also suggested that signatories' reduction in unhealthy food advertising pre-dated the introduction of the initiatives.²² Thus, it was possible that changes in signatories' advertising patterns were not the result of the initiatives per se. Instead, changing consumer sentiment motivated both reductions in unhealthy food advertising and the introduction of self-regulation.²³ In addition, the authors could not rule out the possibility that food advertising was shifting from television to other media.²⁴ The study concluded that '[t]he continued advertising of unhealthy foods during

¹⁷ Ibid; King et al, 'Building the Case for Independent Monitoring of Food Advertising on Australian Television', above n 12, 5.

¹⁸ King et al, 'Building the Case for Independent Monitoring of Food Advertising on Australian Television', above n 12; Lesley King et al, 'Industry Self-Regulation of Television Food Advertising: Responsible or Responsive?' (2011) 6(2 pt 2) *International Journal of Paediatric Obesity* e390 <<http://onlinelibrary.wiley.com/doi/10.3109/17477166.2010.517313/full>>; Lana Hebden et al, 'Advertising of Fast-Food to Children on Australian Television: The Impact of Industry Self-Regulation' (2011) 195(1) *Medical Journal of Australia* 20.

¹⁹ King et al, 'Industry Self-Regulation of Television Food Advertising: Responsible or Responsive?' above n 18.

²⁰ Ibid e394.

²¹ Ibid e395.

²² Ibid e396.

²³ Ibid.

²⁴ Ibid. See also Michael J McGinnis, Jennifer Gootman and Vivica I Kraak (eds), *Food Marketing to Children and Youth: Threat or Opportunity?* (National Academies Press, 2006) 183; Georgina Cairns, Kathryn Angus and Gerard Hastings, 'The Extent, Nature and Effects of Food Promotion to Children: A Review of the Evidence

peak viewing times... indicates that this self-regulatory code does not fully or adequately protect children. ...²⁵

A 2011 study evaluated the effects of the QSRI on fast-food advertising on free-to-air television in Sydney.²⁶ The number of fast-food advertisements increased from 1.1 per hour in 2009 to 1.5 per hour in 2010.²⁷ The frequency of unhealthy fast-food advertising decreased, although the authors said that this was most probably an artefact caused by an increase in the relative share of advertising for healthier products and brand promotions.²⁸ QSRI signatories were responsible for the majority of fast-food advertising (92 per cent in 2009 and 86 per cent in 2010). However, between 2009 and 2010 non-signatory companies reduced the frequency of their unhealthy food advertising (relative to all fast-food advertising) by 84 per cent, while signatories reduced theirs by only 17 per cent. Thus, any reductions in unhealthy fast-food advertising were predominantly from non-signatory companies.²⁹ Further, the frequency of unhealthy fast-food advertisements remained the same during children's peak viewing periods despite these reductions. The authors also raised concerns about an increase in advertising for company brands or branded promotions, given its proven influence on children's taste preferences and consumption patterns.³⁰

A 2012 study evaluated the impact of both the RCMI and QSRI on television food advertising.³¹ It found a significant decline in food advertising between 2009 and 2011, from 7.3 advertisements per hour to 5.8.³² After excluding fast-food advertisements, the mean frequency of unhealthy food advertising declined from 2.9 advertisements per hour in 2006 to 1.3 in 2011. This decline occurred prior to the introduction of the RCMI in 2009, suggesting that participants' advertising patterns had altered before the code came into effect.³³

The frequency of fast-food advertising increased between 2006 and 2010, despite the introduction of the QSRI in 2009. While this included an increase in advertising for healthier

to December 2008' (World Health Organisation, 2009) 14

<http://www.who.int/dietphysicalactivity/publications/marketing_evidence_2009/en/index.html>.

²⁵ Ibid.

²⁶ Hebden et al, 'Advertising of Fast-Food to Children on Australian Television: The Impact of Industry Self-Regulation', above n 18.

²⁷ Ibid 22.

²⁸ Ibid 23.

²⁹ Ibid 22-23.

³⁰ Ibid. See, e.g., Thomas N Robinson et al, 'Effects of Fast-food Branding on Young Children's Taste Preferences' (2007) 161(8) *Archives of Paediatrics and Adolescent Medicine* 792.

³¹ King et al, 'Building the Case for Independent Monitoring of Food Advertising on Australian Television', above n 12.

³² Ibid 2.

³³ Ibid 5.

fast-food products, the overall number of healthier food advertisements remained low (one in six fast-food advertisements in 2011).³⁴ RCMI signatories continued to account for 62 per cent of unhealthy food advertising in 2011 (excluding fast-food advertising), while QSRI signatories accounted for 90 per cent of fast-food advertisements.³⁵ Despite a reduction in food advertising overall, the study found that children continued to be exposed to the same amount of unhealthy food advertising in 2011 as they were prior to the commencement of the initiatives.³⁶ The authors concluded that ‘industry self-regulation has had minimal impact in reducing children’s exposure to unhealthy food advertising on... television’.³⁷

In 2010, the South Australian Minister for Health contracted the Commonwealth Scientific and Industrial Research Organisation (CSIRO) to monitor the impact of the RCMI and QSRI on South Australian children’s exposure to unhealthy food advertising.³⁸ The study reported on the nature and extent of food advertising on free-to-air television and pay TV in Adelaide and Whyalla, for six, four days periods between October 2008 and July 2010.³⁹ The total amount of food advertising remained relatively stable across the study period.⁴⁰ Unhealthy products comprised the majority of food advertising, specifically promotions from fast-food restaurants, followed by advertising for sugar-sweetened drinks, chocolate and confectionery.⁴¹ Food advertisements made up 6.3 per cent of total advertisements in C programs on Adelaide free-to-air television.⁴² There were no clear trends in the frequency of food advertising during children’s peak and non-peak viewing periods.⁴³ However, unhealthy food advertising was more common during programs popular with children compared to those that were popular with adults.⁴⁴

³⁴ Ibid.

³⁵ Ibid 4.

³⁶ Ibid.

³⁷ Ibid 6.

³⁸ Emily Brindal, Nadia Corsini and Gilly Hendrie, 'Television Food Advertising to Children in South Australia' (CSIRO, March 2011) <<http://www.sahealth.sa.gov.au/wps/wcm/connect/public+content/sa+health+internet>>.

³⁹ Ibid 5. Whyalla is a large regional town in South Australia.

⁴⁰ Ibid 3. The study found a minor increase in the total rate of food advertising per hour across the study period. However, the authors noted that data were obtained from two separate sources, with systematic differences between the data sets. When excluding information from one company that provided only two data sets (October 2008 and May 2009), this trend disappeared and advertising rates appeared to be stable across the remaining time points.

⁴¹ Ibid 157.

⁴² Ibid executive summary 6.

⁴³ Ibid 51.

⁴⁴ Ibid 55. The study used audience data to determine the 25 most popular programs with children aged zero to 14 years and with adults (18 years and over).

RCMI signatories accounted for 40 per cent of food advertising (excluding fast-foods), but were responsible for a higher proportion of unhealthy food advertisements than non-signatories (for example, 78.3 per cent versus 23.5 per cent of unhealthy food advertisements in July 2010).⁴⁵ There were no clear changes in the pattern of unhealthy food advertising by signatories from October 2008 to July 2010.⁴⁶ Advertising by QSRI signatories comprised 70 per cent of all fast-food advertisements in July 2010, with these companies screening more unhealthy food advertisements than non-signatories.⁴⁷ The proportion of unhealthy fast-food advertising had increased since the commencement of the QSRI, for all companies (from 1.34 advertisements per hour in October 2009 to 1.56 advertisements in July 2010).⁴⁸

The authors concluded that children's exposure to unhealthy food advertising had remained the same since October 2008. There were very low rates of food advertising during children's programming. However, there was a much higher frequency of unhealthy food advertising during general programming when large numbers of children watched television, but when the RCMI and QSRI did not apply.⁴⁹ The authors recommended redefining the initiatives to cover television viewing times and programs that are popular with children if self-regulation was to reduce children's exposure to unhealthy food advertising.⁵⁰ The fact that they do not do so already is a significant flaw in the scheme, which I return to in Chapter 6.

3. Government reviews of the existing evidence

In 2010, the Australian Communications and Media Authority (ACMA) monitored the operation of the RCMI and QSRI, in order to determine 'whether industry can adequately address community concern without the need for government regulation'.⁵¹ The ACMA based its review on stakeholder consultation, case studies of complaint determinations under the two codes, a review of existing research and its own analysis of the regulatory framework established by the initiatives. Its final report identified on-going community concern about unhealthy food advertising to children despite the creation of the codes.⁵² The ACMA noted

⁴⁵ Ibid executive summary 10.

⁴⁶ Ibid 136

⁴⁷ Ibid 111

⁴⁸ Ibid 157.

⁴⁹ Ibid 156.

⁵⁰ Ibid 157.

⁵¹ Australian Communications and Media Authority, 'Industry Self-Regulation of Children's Food and Beverage Advertising: ACMA Monitoring Report', above n 12, 5.

⁵² Ibid 6.

limitations in the AFGC's monitoring activity (as described in section 1),⁵³ but it also acknowledged that independent research showed some changes in advertising rates following the introduction of the two initiatives.⁵⁴ However, the ACMA said that these studies did not provide a sufficient evidence base on which to determine whether the initiatives had reduced the frequency of unhealthy food and beverage advertising on commercial free-to-air television.⁵⁵ It concluded that any 'real-life' changes in the level of children's exposure to food and beverage advertising remained unclear.⁵⁶

The ACMA ceased monitoring food industry self-regulation after its 2011 report, due to the increasing role of the Australian National Preventive Health Agency (ANPHA) in evaluating food advertising (introduced in Chapter 1). In its response to the report of the National Preventative Health Taskforce, the Federal government tasked ANPHA with monitoring and evaluating the two food industry initiatives.⁵⁷ ANPHA is a statutory body, established by the *Australian National Preventive Health Agency Act 2010* (Cth). Its main functions are to advise the different levels of government on preventive health, determine standards and manage programs on non-communicable disease prevention.⁵⁸ This includes by monitoring, evaluating and building evidence in relation to preventive health strategies.⁵⁹ ANPHA focuses on programs and policies that reduce the risk factors for chronic disease, namely tobacco use, harmful alcohol consumption and obesity.⁶⁰ Its *Strategic Plan 2011-2015* identifies unhealthy food advertising as a key priority area, and states that ANPHA will 'monitor and engage with industry and other partners on food products and marketing, including products for children and marketing to which they are exposed with attention to energy-dense, nutrient-poor foods and beverages'.⁶¹

Chapter 11 describes ANPHA's monitoring activities in more detail. Importantly for this chapter, ANPHA released a report on the RCMI and QSRI in October 2012, comprising the

⁵³ Ibid 24.

⁵⁴ Ibid 27.

⁵⁵ Ibid.

⁵⁶ Ibid 6.

⁵⁷ Australian Government, 'Taking Preventative Action: A Response to Australia: The Healthiest Country by 2020, The Report of the National Preventative Health Taskforce' (Commonwealth of Australia, 2010) 47 <<http://www.preventativehealth.org.au/>>.

⁵⁸ Australian National Preventive Health Agency Act 2010 (Cth) s 2A.

⁵⁹ Other functions include facilitating a national preventive health research infrastructure; creating partnerships for workplace, school and community interventions; assisting in the development of the health prevention workforce, and coordinating and implementing a national approach to social marketing initiatives. See *Australian National Preventive Health Agency Act 2010* (Cth) s 2A.

⁶⁰ Australian National Preventive Health Agency, *Strategic Plan 2011-2015* (2011) 1 Australian Government <<http://anpha.gov.au/internet/anpha/publishing.nsf/Content/strategic-plan>>.

⁶¹ Ibid 18.

first systematic evaluation of the evidence on children's exposure to television advertising of unhealthy foods and beverages since the introduction of the initiatives.⁶² The report described:⁶³

- The amount of unhealthy food advertising on Australian television during children's peak viewing times and according to program classification;
- Changes in the amount of unhealthy food advertising on television since the introduction of the initiatives; and
- Differences in the amount and nature of televised food advertising produced by signatory and non-signatory companies.

The report considered the AFGC's monitoring reports, the studies by researchers at the University of Sydney and the research commissioned from CSIRO.⁶⁴ It synthesised the evidence from these studies to create an overall narrative that addressed each of the objectives above, giving greater weight to findings from higher quality studies.⁶⁵ The report found that estimates of children's exposure to unhealthy food advertisements during peak viewing times varied significantly, from between 0.7 and 6.5 advertisements per hour.⁶⁶ Across all studies, unhealthy foods comprised a higher percentage of all food advertisements than healthy products. Since the introduction the RCMI and QSRI, participants had advertised unhealthy products during children's peak viewing times at higher levels than non-participants.⁶⁷ However, the absolute difference in the frequency of advertising between participants and non-participants was less than one advertisement per hour.⁶⁸ The amount of unhealthy food advertising broadcast during C programs was very low, but many children continued to be exposed to advertising while viewing programs with other classifications.⁶⁹

The report identified two key limitations in existing studies that impacted upon researchers' ability to link the initiatives with changing trends in food advertising. First, there was no research establishing the pattern of unhealthy food advertising prior to the introduction of

⁶² Smithers, John W Lynch and Tracy Merlin, above n 11, 6.

⁶³ Ibid.

⁶⁴ It also considered data on food advertising from Roberts et al, above n 1, which focused on advertisers' compliance with food industry self-regulation, and other regulatory instruments.

⁶⁵ Ibid 9.

⁶⁶ Ibid 2.

⁶⁷ Ibid 30.

⁶⁸ Ibid 39.

⁶⁹ Ibid 3.

food industry self-regulation.⁷⁰ Both the CSIRO and the University of Sydney studies only included one or two data points prior to the introduction of the codes (2006 and 2007).⁷¹ However, internationally agreed procedures for the analysis of time series data require research to have approximately ten data points in order to establish a reliable trend.⁷² Thus, while there appeared to be a decline in unhealthy food advertising, it was not possible to attribute this trend to the creation of the initiatives.⁷³

The second limitation was that existing research did not use seasonally representative data. For example, the University of Sydney studies used advertising data collected in April or May. International research suggests that advertising rates are cyclical, with one UK study finding that unhealthy food advertising peaked during February to May (at 65 to 70 per cent of all food advertising), and bottomed out (at 35 per cent) in December.⁷⁴ However, studies did not establish whether food advertising in Australia followed a similar seasonal pattern, or varied according to television ratings or holiday periods.⁷⁵ Thus, research on the codes could not show whether changes in advertising rates were due to code implementation, shifting advertising to other months of the year, or the influence of economic pressures such as the Global Financial Crisis.⁷⁶ The report concluded that it was not possible to know with any confidence whether the introduction of the codes had directly influenced unhealthy food advertising to children.⁷⁷ However, a common theme was that both signatory and non-signatory companies continued to advertise unhealthy foods during children's programs and at peak viewing times.⁷⁸

4. Problems with measuring the outcomes of the RCMI and QSRI

To date, research on the effects of the RCMI and QSRI has produced inconclusive results. This is partly because studies on the impact of food industry self-regulation are relatively new, both in Australia and overseas.⁷⁹ However, disagreements about the scheme's success

⁷⁰ Ibid 2.

⁷¹ Ibid.

⁷² Ibid.

⁷³ Ibid 25.

⁷⁴ See Emma J Boyland et al, 'The Extent of Food Advertising to Children on UK Television in 2008' (2011) 6(5-6) *International Journal of Paediatric Obesity* 455, cited in Smithers, Lynch and Merlin, above n 11, 37.

⁷⁵ Smithers, Lynch and Merlin, above n 11, 2.

⁷⁶ Ibid 15.

⁷⁷ Ibid 3.

⁷⁸ Ibid 32.

⁷⁹ See Roberts et al, above n 1, 5. See also M Mar Romero-Fernández, Miguel Ángel Royo-Bordonado and Fernando Rodríguez-Artalejo, 'Compliance with Self-Regulation of Television Food and Beverage Advertising Aimed at Children in Spain' (2009) 13(7) *Public Health Nutrition* 1013; Dale Kunkel, Christopher McKinley

are not simply the result of a lack of empirical research. They reflect disagreement between key stakeholders about what the objectives of the code are, or what they should be, and how objectives should be measured. The food industry states that the initiatives regulate advertising targeted directly to children, whether considering the theme, visuals and language used in the advertisement, or its placement in media directed to children, defined with reference to audience share or the rating of the program.⁸⁰ It claims that the codes are successful in reducing such advertising, as evidenced by the low rates of unhealthy food advertising during designated children's programming.⁸¹ However, public health researchers argue that the codes should aim to reduce children's exposure to unhealthy food advertising, regardless of whether advertising targets children or older age groups.⁸² They remain concerned about children's persistently high exposure to unhealthy food advertising during peak viewing times.⁸³

A further complication is that each study used varying definitions of unhealthy/healthy foods, 'children' and children's programs or peak viewing times.⁸⁴ For example, some studies reported on food advertising during children's peak viewing times, while others examined advertising during children's programs.⁸⁵ Further, the definition of children's peak viewing time or children's programs differed according to the proportion of the audience that comprised children (ranging from more than 25, 35 or 50 per cent), by weekdays and weekends, by age group (zero to four years versus five to 12 years of age) and according to whether advertising was on free-to-air or pay television.⁸⁶ For this reason, ANPHA's report concluded that '... there remains a great deal of unexplained heterogeneity in rates and prevalence across studies that is, at least partly, due to different sampling and sources of

and Paul Wright, 'The Impact of Industry Self-Regulation on the Nutritional Quality of Foods Advertised on Television to Children' (Children Now, December 2009)

<http://www.childrennow.org/index.php/learn/advertising_obesity>; Monique Potvin Kent, Lise Dubois and Alissa Wanless, 'Self-Regulation by Industry of Food Marketing is Having Little Impact During Children's Preferred Television' (2011) 6(5-6) *International Journal of Paediatric Obesity* 401; Jennifer L Harris et al, 'Redefining "Child-Directed Advertising" to Reduce Unhealthy Television Food Advertising' (2013) 44(4) *American Journal of Preventive Medicine* 358.

⁸⁰ See Australian Food and Grocery Council, *Food and Beverage Advertising to Children: Activity Report* (2012), above n 2, 5.

⁸¹ *Ibid* 9.

⁸² See, e.g., S MacKay et al, 'A Comprehensive Approach to Protecting Children from Unhealthy Food Advertising' (Obesity Policy Coalition, 2011) 31 <<http://www.opc.org.au/whatwedo/policydocuments.aspx>>.

⁸³ See, e.g., King et al, 'Industry Self-Regulation of Television Food Advertising: Responsible or Responsive?' above n 18. See also Susannah Tymms, 'Responsible Advertising to Children: An Independent Review of the Australian Food and Beverage Industry Self-Regulatory Codes' (AGFC, October 2012) 55 <<http://www.afgc.org.au/industry-codes/advertising-to-children/rcmi/rcmi-reports-2009.html>>.

⁸⁴ Smithers, Lynch and Merlin, above n 11, 37.

⁸⁵ *Ibid* 10.

⁸⁶ *Ibid* 11.

data'.⁸⁷ The Australian debates reflect similar issues about research on advertising and childhood obesity internationally, where the relevant literature contains a number of gaps and studies are inconsistent in their method and focus.⁸⁸

Some of the difficulties in measuring the codes' effects stem from the design of the self-regulatory systems themselves. As with many other voluntary codes, the RCMI and QSRI do not contain clearly defined objectives or measurable targets.⁸⁹ This creates scope for disagreement about their objectives, and how to define and evaluate effectiveness.⁹⁰ The codes also lack mechanisms for systematically gathering evidence of their success, which are required for effective monitoring and oversight.⁹¹ Further, each RCMI signatory company interprets the main code document differently in its company action plan. The ambiguity and variability in company commitments make it difficult for independent researchers to evaluate compliance.⁹² I return to these problems in Chapter 7.

More fundamentally, differences of opinion on the success of self-regulation relate to the politically charged nature of advertising regulation, and the disputed connections between food advertising and childhood obesity. Public health advocates argue that children's exposure to unhealthy food advertising makes a significant (if small) contribution to childhood obesity.⁹³ Accordingly, reducing children's exposure to this form of advertising would produce social benefits that outweigh the economic costs of regulation. This is particularly the case where advertising restrictions form part of a 'basket of interventions'

⁸⁷ Ibid 37.

⁸⁸ Sonia Livingstone, 'A Commentary on the Research Evidence Regarding the Effects of Food Promotion on Children' (Department of Media and Communications, London School of Economics and Political Science, February 2004) 4 <<http://eprints.lse.ac.uk/21756/>>; David Buckingham, 'The Appliance of Science: The Role of Evidence in the Making of Regulatory Policy on Children and Food Advertising in the UK' (2009) 15(2) *International Journal of Cultural Policy* 201, 209.

⁸⁹ See Neil Gunningham and Joseph Rees, 'Industry Self-Regulation: An Institutional Perspective' (1997) 19(4) *Law & Policy* 363, 376; Diana M Bowman and Graeme A Hodge, 'Counting on Codes: An Examination of Transnational Codes as a Regulatory Governance Mechanism for Nanotechnologies' (2009) 3(2) *Regulation and Governance* 145, 155-157.

⁹⁰ David Fuchs, Agni Kalfagianni and Tetty Havinga, 'Actors in Private Food Governance: The Legitimacy of Retail Standards and Multistakeholder Initiatives with Civil Society Participation' (2011) 28(3) *Agriculture and Human Values* 353, 359.

⁹¹ King et al, 'Building the Case for Independent Monitoring of Food Advertising on Australian Television', above n 12, 5.

⁹² Hebden et al, 'Industry Self-regulation of Food Marketing to Children: Reading the Fine Print', above n 1, 235; King et al, 'Building the Case for Independent Monitoring of Food Advertising on Australian Television', above n 12, 2.

⁹³ See the discussion in Chapter 1. See e.g., McGinnis, Gootman and Kraak, above n 24; Cairns, Angus and Hastings, above n 24.

that together addressed the causes of obesity.⁹⁴ Researchers also say that self-regulation insufficiently reduces children's exposure to unhealthy food advertising, justifying public rather than private regulation.⁹⁵

In contrast, the food industry's position is that there is no proven causal link between advertising and childhood obesity.⁹⁶ Accordingly, it argues that the cost of government intervention would be disproportionate to the uncertain benefits conferred by advertising restrictions.⁹⁷ The same argument was made by the ACMA in its review of the *Children's Television Standards 2005*, as I discussed in Chapter 1.⁹⁸

Both industry and public health groups use evaluations of efficacy to support their policy positions, suggesting that measuring the success of voluntary codes is not simply a technical or objective exercise.⁹⁹ Rather, understandings (and measurements) of efficacy are socially constructed and reflect the policy objectives of the different actors engaged in evaluative processes.¹⁰⁰ Given these competing and contested understandings of 'effective' self-regulation, there is unlikely to be one final answer to the question of whether voluntary initiatives can successfully promote public health goals. However, this does not absolve the parties involved from responsibility for their actions or inactions, nor does it mean that measures should not be taken to address the influence of unhealthy food advertising on children's dietary health. As I discussed in Chapter 3, the precautionary principle requires that governments act on the probable impact of self-regulation, rather than waiting for a definitive answer on the scheme's success.¹⁰¹

⁹⁴ Roger Magnusson, 'What's Law Got to Do with It? Part 1: A Framework for Obesity Prevention' (2008) 5(10) *Australia and New Zealand Health Policy*

<<http://www.publish.csiro.au.ezproxy2.library.usyd.edu.au/nid/278/issue/5796.htm>>.

⁹⁵ See the discussion in Chapter 1. See, e.g., Lumley, Martin and Antonopoulos, above n 1, 5.

⁹⁶ See Australian Food and Grocery Council, *Food and Beverage Advertising to Children: Activity Report* (2012), above n 2, 4.

⁹⁷ *Ibid.*

⁹⁸ See Australian Communications and Media Authority, 'Review of the Children's Television Standards 2005: Final Report of the Review' (Australian Government, August 2009)

<<http://www.acma.gov.au/Industry/Broadcast/Television/Childrens-TV/childrens-television-standards-review>>.

⁹⁹ Buckingham, above n 88, 210.

¹⁰⁰ *Ibid.*, 211. See also John I Kitsuse and Aaron V Cicourel, 'A Note on the Uses of Official Statistics' (1963) 11(2) *Social Problems* 131; Carol Lee Bacchi, *Women, Policy and Politics: The Construction of Policy Problems* (Sage, 1999); Deborah Stone, *Policy Paradox: The Art of Political Decision Making* (Norton, 2002). For similar comments on the concept of compliance, see Christine Parker and Vibeke Lehmann Nielsen, 'The Challenge of Empirical Research on Business Compliance in Regulatory Capitalism' (2009) 5 *Annual Review of Law and Social Science* 45.

¹⁰¹ See also Gerard Hastings et al, 'Review of the Research on the Effects of Food Promotion to Children' (Centre for Social Marketing, the University of Strathclyde, 22 September 2003) 13 <<http://www.food.gov.uk/multimedia/pdfs/foodpromotiontochildren1.pdf>>, cited in Sonia Livingstone,

5. A different approach to evaluating food industry self-regulation

Given the uncertain impact of self-regulation on advertising unhealthy food, this thesis proposes a different approach to assessing the efficacy of self-regulation. Although I consider research on the outcomes of self-regulation, I focus on whether the RCMI and QSRI establish the building blocks of a potentially successful self-regulatory regime. This involves considering the terms and conditions of the codes themselves, as well as the efficacy of processes for managing, monitoring, enforcing and reviewing the scheme. In other words, I am concerned with the design and implementation of the food industry's self-regulatory scheme, within its broader political and social context.¹⁰² Although some studies take a similar approach,¹⁰³ regulatory design is a less frequently considered aspect of the RCMI and QSRI. Certainly there has been no academic research that considers both code content and regulatory processes under one overarching conceptual framework.

Analysing regulatory design is a weaker measure of self-regulation's success than evaluating its actual impact on public policy objectives, and such an analysis does not remove the need to assess the substantive outcomes of voluntary schemes.¹⁰⁴ There is also a danger that focusing on processes of code development and implementation will deflect attention away from the substance of codes, and whether they actually have or can produce changes in industry behaviour.¹⁰⁵ Public health researchers raise these concerns in their evaluation and criticisms of food and alcohol industry self-regulation. According to Wendy Loxley and colleagues, governments focus on continually refining alcohol industry advertising codes, but overlook 'the essential question of whether it serves the public interest to allow promotion of products that have considerable adverse impacts on public health'.¹⁰⁶ Thus, focusing on the details of self-regulation may distract attention from more fundamental issues, such as

'Assessing the Research Base for the Policy Debate over the Effects of Food Advertising on Children' (2005) 24(3) *International Journal of Advertising* 273, 279; David Kriebel and Joel Tickner, 'Reenergising Public Health Through Precaution' (2001) 91(9) *American Journal of Public Health* 1351.

¹⁰² The independent review of the RCMI took a similar approach, although it was less broad-ranging in scope and did not consider the role of public health groups and government in food industry self-regulation (as I do). See Tymms, above n 83, 31.

¹⁰³ See, e.g., Hebden et al, 'Industry Self-Regulation of Food Marketing to Children: Reading the Fine Print', above n 1; Hebden et al, 'Regulating the Types of Foods and Beverages Marketed to Australian Children: How Useful are Food Industry Commitments?' above n 1.

¹⁰⁴ David Cohen, 'The Role of the State in a Privatised Regulatory Environment' in Kernaghan Webb (ed), *Voluntary Codes: Private Governance, the Public Interest and Innovation* (Carleton Research Unit for Innovation, Science and Environment, Carleton University, 2004) 25, 53.

¹⁰⁵ Ibid 40.

¹⁰⁶ Wendy Loxley et al, 'Alcohol Policy and Harm Reduction in Australia' (2005) 24(6) *Drug and Alcohol Review* 559, 563.

whether companies should be allowed to promote products that have a serious impact on public health.¹⁰⁷

In addition, socio-legal analysis often contains normative assumptions about the failure of state intervention and the desirability of using market-based techniques to secure public objectives.¹⁰⁸ Thus, analysing self-regulatory structures and processes risks validating and legitimising industry discourses on the value of self-regulation, in turn contributing to the dominance of industry interests in policy debate.¹⁰⁹ When I published some of this research as a peer-reviewed journal article, the anonymous reviewers raised similar points. One said that considering self-regulatory processes without also evaluating the codes' efficacy risked producing research that reads as 'how to gain credibility without actually doing much'. Another commented that improving the accountability and transparency of self-regulation (the focus of my article) did not 'count for that much if they serve only to legitimise [self-regulation] without delivering improved social outcomes'. Ronen Shamir argues that this is a perennial danger for regulatory and sociolegal scholars. In attempting to describe and design new regulatory tools that foster the social responsibility of companies, researchers provide technical expertise that upholds and legitimises the desirability of private rather than public regulation, and contributes to the transformation of normative and ethical issues into instruments of business management that enhance companies' profitability, rather than furthering public objectives.¹¹⁰

According to the reviewers of my paper, my research implicitly assumes that voluntary approaches can improve the food marketing environment, so long as schemes are designed effectively and operate within an institutional environment that supports their objectives. Their comments reflect the position that self-regulation cannot significantly reduce children's exposure to unhealthy food advertising, even if implemented perfectly.¹¹¹ This is due to an inherent conflict of interest between the food industry's profit motive and public health objectives, meaning that the industry will never unilaterally introduce an effective scheme. In light of the failure of self-regulation, as well as the extent of the obesity epidemic,

¹⁰⁷ Ibid.

¹⁰⁸ Ronen Shamir, 'Capitalism, Governance and Authority: The Case of Corporate Social Responsibility' (2010) 6 *Annual Review of Law and Social Science* 531.

¹⁰⁹ Ibid.

¹¹⁰ Ibid.

¹¹¹ See also C Hawkes, 'Self-Regulation of Food Advertising: What it Can, Could and Cannot Do To Discourage Unhealthy Eating Habits Among Children' (2005) 30(4) *Nutrition Bulletin* 374, 380-381.

government regulation is needed to restrict the placement of unhealthy food advertising in media with significant child audiences.¹¹²

Despite public health researchers' concerns, I argue that there is value in assessing the efficacy of the RCMI and QSRI against process- as well as outcome-based criteria, especially considering the debate over what the objectives of food industry self-regulation are, or should be, and whether the codes have achieved those goals. Literature on 'reflexive,' 'procedural' or 'responsive' regulation suggests connections between the substance of regulation and its institutional design, which are often overlooked by public health researchers. Self-regulation frequently lacks mechanisms that make it transparent and accountable to the public.¹¹³ This undermines the legitimacy of private regulation, as it operates outside of democratic norms that call for citizens' participation in regulatory decision-making.¹¹⁴ Regulatory scholars argue for private forms of regulation that include mechanisms for public participation and deliberation as a means to secure regulatory objectives that work to meet social goals.¹¹⁵ This is because incorporating external stakeholders in regulatory processes fosters self-regulation that is more democratic, and is more likely to reflect public rather than private interests.¹¹⁶ In other words, where industry actors control self-regulatory processes, the terms and objectives are more likely to reflect industry interests than to serve public health goals.¹¹⁷

This argument implies that it is important to analyse regulatory processes as a way of shedding light on the nature of the codes' content, as well as the strengths and limitations in the design of the scheme. Using a process-based analysis to evaluate the impact of food industry self-regulation may provide an explanation as to why the RCMI and QSRI have failed to reduce children's exposure to unhealthy food advertising, and under what conditions (if any) they could be expected to achieve public health objectives. This kind of understanding is necessary before governments can be persuaded that self-regulation is an inadequate vehicle for achieving public interest goals, and that some form of regulation or co-regulation is required. This is particularly the case considering the contemporary focus on

¹¹² Ibid 381. See also Lumley, Martin and Antonopoulos, above n 1, 6; MacKay et al, above n 82, 27.

¹¹³ Virginia Haufler, *A Public Role for the Private Sector: Industry Self-Regulation in a Global Economy* (Carnegie Endowment for National Peace, 2001) 2.

¹¹⁴ Ibid. See also Kernaghan Webb, 'Understanding the Voluntary Codes Phenomenon' in Kernaghan Webb (ed), *Voluntary Codes: Private Governance, the Public Interest and Innovation* (Carleton Research Unit for Innovation, Science and Environment, Carleton University, 2004) 2, 18.

¹¹⁵ Christine Parker, *The Open Corporation: Effective Self-Regulation and Democracy* (Cambridge University Press, 2002); Julia Black, 'Proceduralising Regulation: Part 1' (2000) 20(4) *Oxford Journal of Legal Studies* 597.

¹¹⁶ Black, above n 115.

¹¹⁷ Webb, above n 114, 18.

‘evidence-based’ based policy making and the demands of regulatory impact criteria.¹¹⁸ Distinct from content-related concerns, code development and implementation processes should be fair and representative of public opinion if the community is to support private, industry-based systems of regulation.¹¹⁹

In order to address concerns about the weaknesses of process-based evaluation (i.e. that it may be tokenistic, or may simply affirm the value of self-regulation), my analysis draws upon independent studies that evaluate the impact of the RCMI and QSRI on children’s exposure to unhealthy food advertising. Studies that analyse the codes’ outcomes use television advertising data to measure the frequency and nature of food advertising during children’s peak viewing times or in television programs classified as suitable for children.¹²⁰ As a sociolegal researcher, this form of analysis lies outside my skill set, and so I do not directly measure the outcomes of the initiatives in terms of changes in the nature and volume of food advertising on television. However, there are an increasing number of studies using this methodology, both in Australia and internationally, and they consistently find that the frequency of unhealthy food advertising remains high during children’s peak viewing periods, suggesting that food industry initiatives have done little to protect children from exposure to this advertising.¹²¹ I use this research to provide evidence-based criteria against which to evaluate the success of the RCMI and QSRI, defined in terms of their impact on children’s exposure to unhealthy food advertising (which Chapter 1 identifies as the appropriate goal of food industry self-regulation).

Chapter 11 outlines the argument that government regulation of food advertising to children is likely to develop slowly and in stages, if at all. This argument is based on the history of tobacco and alcohol advertising, as well the fact that self-regulation remains the preferred option for restricting unhealthy food advertising to children in many jurisdictions.¹²² Combined with the Federal government’s reluctance to restrict food advertising directly, these factors suggest that statutory regulation is unlikely to eventuate in the immediate future.

¹¹⁸ See Buckingham, above n 88, 203, as well as the discussion in Chapter 11 below.

¹¹⁹ Cohen, above n 104, 41.

¹²⁰ See Smithers, Lynch and Merlin, above n 11, 10-14.

¹²¹ Ibid. See also, Jennifer L Harris et al, 'Defining "Child-Directed Advertising" to Reduce Unhealthy Television Food Advertising' (2013) 44(4) *American Journal of Preventive Medicine* 358.

¹²² See, e.g., Corinna Hawkes 'Marketing Food to Children: Changes in the Global Regulatory Environment 2004-2006' (World Health Organisation, 2007)

<http://www.who.int/dietphysicalactivity/publications/regulatory_environment_2007/en/>; C Hawkes and T Lobstein, 'Regulating the Commercial Promotion of Food to Children: A Survey of Actions Worldwide' (2011) 6(2) *International Journal of Paediatric Obesity* 83.

When governments do act, it is more likely that they will build on an existing scheme rather than replacing it with an entirely new legislative model.¹²³ It follows that understanding the limitations of food industry self-regulation is crucial if government action takes the form of regulatory or legislative ‘scaffolds’ that are added onto the existing scheme.¹²⁴

Further, policy makers need practical suggestions for strengthening the current regime incrementally, at least as an interim measure, and an analysis of regulatory processes provides a basis for understanding how governments might improve self- or co-regulatory regimes. Accordingly, the next section of the chapter sets out a framework for assessing the components of effective self-regulation. This framework will be used to evaluate the voluntary scheme established by the RCMI and QSRI and to make recommendations for ways in which it could be improved.

6. The components of an effective self-regulatory regime

According to Gunningham and Rees, the effectiveness of self-regulation ‘varies enormously among industries...’¹²⁵ This is due to the social and economic environment of self-regulation as well as the institutional design of voluntary schemes themselves.¹²⁶ Given the importance of context to the efficacy of self-regulation, it is not possible to design one optimal scheme that can apply in all circumstances.¹²⁷ However, researchers describe some general factors that are more likely to make it successful, and specify some processes and principles for designing effective regulation.¹²⁸ This chapter identifies the key determinants of an effective voluntary system and divides them into the following categories:

- Scheme design;
- Company practices;
- Industry characteristics; and
- Institutional pressures.

¹²³ See the discussion of the development of the UK’s co-regulatory restrictions on unhealthy food advertising to children in Chapter 11.

¹²⁴ See Roger S Magnusson and Belinda H Reeve, ‘Regulation and the Prevention Agenda’ (2013) 199(2) *Medical Journal of Australia* 89

¹²⁵ Gunningham and Joseph Rees, above n 89, 370.

¹²⁶ *Ibid.*

¹²⁷ Neil Gunningham and Darren Sinclair, ‘Designing Environmental Policy’ in Neil Gunningham, Peter Grabosky and Darren Sinclair (eds), *Smart Regulation: Designing Environmental Policy* (Clarendon Press, 1998) 373, 375.

¹²⁸ *Ibid.*

Table 8 translates these criteria into specific goals, requirements and indicators that voluntary schemes must meet if they are to be successful. These criteria provide a framework that I use to evaluate the operation of food industry self-regulation.¹²⁹ To create this framework I selected and compiled recommendations from theoretical literature on regulation and regulatory scheme design,¹³⁰ as well as empirical studies of the operation of various regulatory regimes.¹³¹ I also considered proposals for effective advertising regulatory models based on studies of Australian advertising self-regulation.¹³² Finally, I drew upon government guidelines on the creation of voluntary codes and other self-regulatory measures.¹³³ Governments in a number of jurisdictions have promulgated such guides, reflecting increasing state reliance on self-regulation to further public objectives.¹³⁴

¹²⁹ Ibid 375-376.

¹³⁰ See, e.g., Neil Gunningham, Peter Grabosky and Darren Sinclair, *Smart Regulation: Designing Environmental Policy* (Clarendon Press, 1998); Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, 1992).

¹³¹ See, e.g., Joseph Rees, *Hostages of Each Other: The Transformation of Nuclear Safety Since Three Mile Island* (The University of Chicago Press, 1994); Benjamin Cashore, Graeme Auld and Deanna Newsom, *Governing Through Markets: Forest Certification and the Emergence of Non-State Authority* (Yale University Press, 2004); Neil Gunningham, 'Environment, Self-Regulation and the Chemical Industry: Assessing Responsible Care' (1995) 17(1) *Law & Policy* 57.

¹³² See, e.g., Debra Harker and Michael Harker, 'The Role of Codes of Conduct in the Advertising Self-Regulatory Framework' (2000) 20(2) *Journal of Macromarketing* 155; Debra Harker, 'Towards Effective Advertising Self-Regulation in Australia: The Seven Components' (2003) 9(2) *Journal of Marketing Communication* 93. See also J J Boddewyn, *Advertising Self-Regulation and Outside Participation: A Multinational Comparison* (Quorum Books, 1988).

¹³³ See, e.g., OfCom, *Identifying Appropriate Regulatory Solutions: Principles for Analysing Self- and Co-Regulation* (2008) <<http://stakeholders.ofcom.org.uk/consultations/coregulation/statement/>>; Australian Competition and Consumer Commission, 'Guidelines for Developing Effective Voluntary Industry Codes of Conduct' (ACCC, July 2011) <<http://www.accc.gov.au/content/index.phtml/itemId/658186>>; Australian Communications and Media Authority, 'Optimal Conditions for Effective Self- and Co-Regulatory Arrangements' (Australian Government, September 2011) <<http://www.acma.gov.au/theACMA/optimal-conditions-for-effective-self-and-coregulatory-arrangements>>.

¹³⁴ For a description of the development of Australian Federal government guides on self-regulation, see Neil Gunningham, 'Codes of Practice: The Australian Experience' in Kernaghan Webb (ed), *Voluntary Codes: Private Governance, the Public Interest and Innovation* (Carleton Research Unit for Innovation, Science and Environment, Carleton University, 2004) 317.

Table 8. Criteria for effective self-regulation

Aspect	Goal	Requirements and indicators
Scheme design	<p>Clear goals that further regulatory objectives.</p> <p>Self-regulatory processes facilitate transparent and accountable self-regulation.</p>	<ul style="list-style-type: none"> • Adequate resourcing. • Clear terms and definitions. • Concrete objectives that can be measured. • Processes are in place for monitoring, information dissemination, redressing complaints, enforcement and review. • Public disclosure of scheme objectives, signatories, annual compliance reports. • Capacity for independent review. • Incorporation of external stakeholders in regulatory processes.
Corporate practices	<p>Companies internalise the norms contained in self-regulatory instruments.</p>	<ul style="list-style-type: none"> • Scheme requirements are incorporated into internal policies. • Processes of implementation and enforcement are in place, e.g. review of compliance by designated staff members. • Senior management are committed to self-regulation.
Industry characteristics	<p>Industry demonstrates willingness and ability to implement self-regulatory regime.</p>	<ul style="list-style-type: none"> • Significant participation by industry. • Industry cohesion and cooperation. • Mechanisms for collective industry action, e.g. active industry associations. • Coincidence of private and public interests • Existence of a ‘community of shared fate’.
Institutional pressures	<p>Creation of an institutional environment that encourages industry to adhere to an effective self-regulatory scheme.</p>	<ul style="list-style-type: none"> • External stakeholder participation in administration, monitoring, enforcement and review. • Government monitoring and oversight of voluntary scheme. • Explicit threat of government regulation.

Scheme design

Good institutional design and adequate resourcing play a critical role in effective self-regulation.¹ Literature on regulatory design recommends that voluntary schemes contain clear terms and definitions, including terms of reference, decision-making arrangements, voting rights of members and funding arrangements.² The success of voluntary regimes also depends on the extent to which external parties have confidence in these schemes, and perceive them as a legitimate form of governance.³ Accordingly, effective self-regulation contains mechanisms for fostering transparency and accountability to affected parties outside the industry, for example consumers, NGOs and governments.⁴ Transparency and accountability mechanisms include the collection and dissemination of information about the operation of voluntary schemes, as well as provision for external stakeholder input in regulatory processes, particularly monitoring and review of the functioning of self-regulation.⁵

For the purposes of monitoring and enforcement, voluntary codes should establish a system for independent management of consumer complaints, including a review process that incorporates external stakeholders or organisations.⁶ Self-regulatory schemes tend to require companies to report on their progress towards achieving full regulatory compliance.⁷ To complement companies' self-reporting, self-regulation should establish external mechanisms for monitoring and evaluating companies' behaviour.⁸ External oversight of voluntary codes is particularly important to enhance their credibility in the eyes of the public.

Effectiveness also depends upon enforcement measures in cases of non-compliance.⁹ Voluntary schemes often draw upon informal and persuasive measures for enforcement. However, researchers agree that punitive sanctions should be available to deter non-

¹ OfCom, above n 133.

² Ibid 23.

³ Ibid; Julia Black, 'Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes' (2008) 2(2) *Regulation & Governance* 137; Lars H Gulbrandsen, 'Accountability Arrangements in Non-State Standards Organisations: Instrumental Design and Imitation' (2008) 15(4) *Organisation* 563.

⁴ Gunningham and Rees, above n 89, 382-385; Neil Gunningham and Darren Sinclair, *Leaders and Laggards: Next-Generation Environmental Regulation* (GreenLeaf, 2002) 146-147.

⁵ Ibid; Australian Competition and Consumer Commission, above n 130, 12.

⁶ Australian Competition and Consumer Commission, above n 133, 10. See also Gunningham, 'Environment, Self-Regulation and the Chemical Industry: Assessing Responsible Care', above n 131, 72-74; Harker, above n 132, 101-102.

⁷ Gunningham and Sinclair, 'Designing Environmental Policy', above n 127, 146. See, e.g., Rees, above n 131; Cashore, Auld and Newsom, above n 131.

⁸ See Cohen, above n 104, 50; Gunningham and Sinclair, 'Designing Environmental Policy', above n 127, 146.

⁹ OfCom, above n 133, 23; Australian Competition and Consumer Commission, above n 133, 11.

compliance and to support the use of softer enforcement methods.¹⁰ Finally, the operation of self-regulation is enhanced by education and promotional activities that raise the profile of the scheme with both the public and the regulated community.¹¹ Giving self-regulation wide publicity ensures that the public and consumer groups are aware of the scheme, enabling external stakeholder participation in processes of enforcement, for example by laying complaints about non-compliance or boycotting non-compliant companies.

Company practices

Self-regulation attempts to achieve policy outcomes by requiring members to implement internal controls on their behaviour.¹² These range from relatively simple statements of compliance to sophisticated systems of policy development, planning processes, training and education of staff, monitoring and audits of compliance.¹³ Voluntary schemes should also require participants to have some form of in-house system to ensure compliance.¹⁴ Other corporate practices associated with meaningful compliance include a demonstrated commitment from high-level management to implement and comply with the scheme; the existence of an 'internal compliance constituency', i.e., in-house compliance officers with the 'organisational muscle' to influence managerial and employee practices; and the institutionalisation of regulatory requirements into everyday operating procedures, decision-making, performance appraisal and award systems.¹⁵

The capacity of internal controls to shape corporate practices may be impacted by organisational incompetence, limited uptake or symbolic forms of compliance.¹⁶ For example,

¹⁰ See, e.g., Ayres and John Braithwaite, above n 130, ch 2; Andrew King and Michael Lenox, 'Industry Self-Regulation without Sanctions: The Chemical Industry's Responsible Care Program' (2000) 43(4) *The Academy of Management Journal* 698.

¹¹ Australian Competition and Consumer Commission, above n 133, 11.

¹² See Parker, above n 115.

¹³ Ibid 18. See also, Stepan Wood, 'Green Revolution or Greenwash? Voluntary Environmental Standards, Public Law and Private Authority in Canada' in Law Commission of Canada (ed), *New Perspectives on the Public-Private Divide* (UBS Press, 2004) 123; Christine Parker and Vibeke Lehmann Nielsen, 'Corporate Compliance Systems: Could They Make Any Difference?' (2009) 41(3) *Administration & Society* 3.

¹⁴ Australian Competition and Consumer Commission, above n 133, 10. See also Organisation for Economic Co-Operation and Development, 'Corporate Responsibility: Private Initiatives and Public Goals' (OECD, 2001) 77-76 <<http://www.oecd.org/daf/inv/corporateresponsibility/>>; S Prakash Sethi and Olga Emelianova, 'A Failed Strategy of Using Voluntary Codes of Conduct by the Global Mining Industry' (2006) 6(3) *Corporate Governance* 226, 230.

¹⁵ See Parker, above n 115, 53-57.

¹⁶ The latter is where companies adopt management systems that give the appearance of self-regulation, without making significant changes to corporate practices. See Lauren B Edelman, 'Legal Ambiguity and Symbolic Structures: Organisational Mediation of Civil Rights Law' (1992) 97(6) *The American Journal of Sociology* 1531; Lauren B Edelman and Mark C Suchman, 'The Legal Environments of Organisations' (1997) 23 *Annual Review of Sociology* 479. See also Parker and Nielsen, above n 147; Lawrence A Cunningham, 'The Appeal and Limits of Internal Controls to Fight Fraud, Terrorism, Other Ills' (2003-2004) 29 *Journal of Corporate Law* 267.

small- and medium-sized enterprises are more likely than large businesses to lack the expertise, knowledge and resources necessary to monitor the legal environment and implement business controls.¹⁷ They are also more likely to be focused on short-term economic survival, making it more difficult to justify staff training, new technology or formal management systems that present immediate costs to the business, but which would produce long-term economic benefits and enhanced compliance practices.¹⁸

Also, organisational structures may inherently encourage irresponsible business practices, by diffusing responsibility for corporate decision making through a chain of individuals, placing pressure on individuals to behave unethically, or by separating employees' personal ethical values from their commitment to business objectives.¹⁹ However, Parker argues that when combined with appropriate resources, values, and management expertise, management systems can assist in overcoming corporate irresponsibility by creating changes in organisational structures and activities that open up companies to social and ethical concerns.²⁰

Industry-level characteristics

Successful self-regulation relies upon industries having the capacity and collective will to regulate themselves. Accordingly, studies suggest that self-regulation works most effectively in industries dominated by a small number of large companies.²¹ In a more concentrated industry, actors are more likely to have similar interests and to be able to agree on common standards to apply to all companies.²² Given that self-regulation is based on information exchange, consensus and learning between companies, industry cohesion is also important, particularly the presence of an industry association that is able to negotiate on behalf of its members.²³ Industry actors must also possess the desire to act collectively to establish self-regulation and to monitor each other's behaviour and identify non-compliance. The impetus

¹⁷ Parker, above n 115, 56; Neil Gunningham, Dorothy Thornton and Robert A Kagan, 'Motivating Management: Corporate Compliance in Environmental Protection' (2005) 27(2) *Law & Policy* 289.

¹⁸ See, e.g., Charlotte Yapp and Robyn Fairman, 'Factors Affecting Food Safety Compliance Within Small- and Medium-Sized Enterprises: Implications for Regulatory and Enforcement Strategies' (2006) 17(1) *Food Control* 43.

¹⁹ Parker, above n 115, 32-37.

²⁰ Ibid; Parker and Nielsen, above n 147, 28.

²¹ Gunningham and Rees, above n 89, 393-394.

²² Australian Communications and Media Authority, 'Optimal Conditions for Effective Self- and Co-Regulatory Arrangements' above n 133, 10.

²³ Ibid. See also Gunningham and Rees, above n 89; Anil K Gupta and Lawrence J Lad, 'Industry Self-Regulation: An Economic, Organisational and Political Analysis' (1983) 8(3) *The Academy of Management Journal* 416, 422.

for policing other companies' practices may stem from the existence of a 'community of shared fate' within the industry, where the poor performance of one member undermines the reputation of the entire industry.²⁴ Such circumstances can lead to the mobilisation of industry peer pressure to ensure that no one company 'lets the side down' by breaching voluntary standards.²⁵ However, it may create the possibility of collusion, where companies conspire to protect their own interests and keep other players out of the market.²⁶

Self-regulation is most likely to succeed when there is a coincidence between industry self-interest and that of the general public.²⁷ A coincidence of interests exists where the industry takes a long-term view of its relationship with consumers or the community and its responsible operation in society, or where compliance efforts coincide with industry best practice.²⁸ For example, in the area of environmental protection, it may be in the interests of both the industry and the general public for producers to adopt new technologies that use fewer raw materials and less energy, and generate less waste.²⁹ This can be characterised as a 'win-win' situation, since improved environmental performance occurs as a result of companies seeking to improve their economic performance.³⁰ However, often there is a substantial gap between industry profit and public interests, especially where it is possible for companies to 'externalise' the costs of production processes (or of using the product) onto workers, consumers or the public.³¹ Where the gap is large, it is unlikely that self-regulation can deliver improvements in company performance unless there is some form of external pressure to comply with voluntary standards.³² Thus, Neil Gunningham and Joseph Rees identify the necessary conditions for effective self-regulation as either a strong natural coincidence between public and private interest in establishing self-regulation or a source of external pressure sufficient to create such a coincidence of interest artificially.³³

²⁴ See Rees, *Hostages of Each Other*, above n 131, 50; Joseph Rees, 'Development of Communitarian Regulation in the Chemical Industry' (1997) 19(4) *Law & Policy* 477, 489-490.

²⁵ Neil Gunningham, Darren Sinclair and Peter Grabosky, 'Instruments for Environmental Protection' in Neil Gunningham, Peter Grabosky and Darren Sinclair (eds), *Smart Regulation: Designing Environmental Policy* (Clarendon Press, 1998) 37, 54.

²⁶ Cohen, above n 104, 45-46.

²⁷ Gunningham and Rees, above n 89, 389-390.

²⁸ Australian Communications and Media Authority, 'Optimal Conditions for Effective Self- and Co-Regulatory Arrangements', above n 133, 10.

²⁹ Gunningham, Sinclair and Grabosky, 'Instruments for Environmental Protection', above n 159, 53.

³⁰ *Ibid.* See also Gunningham and Rees, above n 89.

³¹ Gunningham and Rees, above n 89, 390.

³² *Ibid.*

³³ *Ibid.*

Institutional pressures

External pressures for industry compliance can come from a variety of sources, including governments, consumers, NGOs and the market itself. Hostile consumer action often provides impetus for the creation of self-regulation.³⁴ Activist groups and NGOs also trigger self-regulation through boycotts, media campaigns and litigation, which are particularly effective where industry actors rely upon their corporate reputation to sell products.³⁵ Researchers conclude that self-regulation is unlikely to be successful without meaningful third-party involvement and influence.³⁶ However, the effectiveness of external pressures brought to bear by consumers and NGOs varies according to the regulatory context, including the proximity of industry participants to the final consumer goods, the type of product, the type of market, the industry's 'reputational sensitivity' and the depth of public sentiment about the issue at hand.³⁷ For example, self-regulation is more likely to be effective in a competitive market, as companies have a greater incentive to respond to consumer demands, and to adopt measures that differentiate their products from those of competitors. It is less successful where products are varied and difficult to compare, making it harder for consumers to distinguish between products, and for companies to detect whether competitors are engaging in misleading practices.³⁸

Researchers point to evidence that the fear of government regulation drives the majority of self-regulatory initiatives in a range of jurisdictions.³⁹ Accordingly, it seems unlikely that voluntary codes will perform effectively in the absence of some form of government oversight.⁴⁰ Specifically, government intervention may be necessary to prevent 'free-riding,' in which companies agree to self-regulate but merely feign compliance, or where a subsection of the industry refuses to join a voluntary code of conduct.⁴¹ Peer group pressure can be used to constrain free-riding in the first scenario, particularly if the industry is relatively cohesive and/or dominated by large actors that are willing to police the conduct of smaller

³⁴ Ibid 391.

³⁵ See Haufler, above n 113, 26-27.

³⁶ Gunningham and Rees, above n 89, 402-403. See also Gunningham and Sinclair, 'Designing Environmental Policy', above n 127, 373.

³⁷ Gunningham and Sinclair, 'Designing Environmental Policy', above n 127, 149-150; Australian Communications and Media Authority, 'Optimal Conditions for Effective Self- and Co-Regulatory Arrangements', above n 133, 10-11.

³⁸ Australian Communications and Media Authority, 'Optimal Conditions for Effective Self- and Co-Regulatory Arrangements', above n 133, 10.

³⁹ Gunningham, Sinclair and Grabosky, 'Instruments for Environmental Protection', above n 159, 55.

⁴⁰ Ibid.

⁴¹ Ibid 150.

companies.⁴² However, if a significant number of companies refuse to join a self-regulatory program, then governments may need to intervene so that participating companies are not put at a competitive disadvantage by the actions of non-members.⁴³ Governments could address the free-rider problem by monitoring compliance and threatening to regulate at a later time if the evidence suggests that voluntary codes have failed to achieve regulatory objectives. However, this strategy is only effective when there is a credible threat of government regulation. As noted by David Cohen, ‘when the driving force behind the privatisation of regulation is the inability of governments to regulate effectively due to budgetary restraints, then compliance with voluntary codes becomes increasingly problematic’.⁴⁴ Researchers conclude that voluntary codes are most likely to be effective when they operate together with government intervention (and other external pressures), meaning that co-regulatory frameworks may be most appropriate for achieving regulatory objectives.⁴⁵

7. Conclusion

This chapter described studies evaluating the effect of food industry self-regulation on children’s exposure to unhealthy food advertising. In light of uncertainty around self-regulation’s success, it proposed a new way of evaluating the RCMI and QSRI based on regulatory processes and design. It also defended the value of evaluating the design of self-regulatory schemes, in addition to their outcomes. Accordingly, the second part of the chapter identified building blocks for effective self-regulation. Successful self-regulation depends upon the commitment of individual companies and the industry as a whole to implement voluntary schemes, and their ability to develop effective regulatory arrangements. However, the institutional environment constitutes a critical determinant of industry’s adoption of, and adherence to, demanding voluntary schemes. In particular, external stakeholder groups provide a check on industry control of self-regulation, ensuring it is more likely to advance public objectives than to simply provide benefits to industry actors. Strong regulatory design harnesses institutional pressures by providing for external stakeholder participation in all aspects of self-regulatory processes, including code creation, administration, monitoring, enforcement and review. The thesis draws upon these insights to explore whether the conditions exist for effective self-regulation of food advertising directed to children. It also

⁴² Ibid 151.

⁴³ Ibid. See also Cohen, above n 104, 42-44.

⁴⁴ Cohen, above n 104, 51.

⁴⁵ See, e.g., Gunningham, 'Environment, Self-Regulation and the Chemical Industry: Assessing Responsible Care', above n 131, 86-90; Organisation for Economic Co-Operation and Development, above n 148, 74.

examines whether it is possible (and desirable) to create such conditions where they do not exist already.

Studies of regulation are predominantly concerned with techniques for effective regulation of industry practices. As described in Chapter 2, regulatory theory tends to pay less attention to the content of schemes, and to the political and social issues underlying their operation. However, debates on food industry self-regulation often concern the substantive constraints on industry conduct imposed by the RCMI and QSRI. Thus the following chapters will evaluate food industry self-regulation according to:

- The terms and conditions of the RCMI and QSRI, and their regulatory design;
- The steps taken by food industry actors to comply with the initiatives;
- The characteristics of the food industry, its capacity to self-regulate and rationale for creating voluntary codes of conduct;
- Public health involvement in the self-regulatory scheme, including participation in, and resistance to industry self-regulation; and
- Government oversight of food industry self-regulation, and whether there is a credible threat of government regulation.

The next chapter describes my research methods, while the following chapter begins my substantive analysis of food industry self-regulation. It assesses the content of the two food industry codes using advertising complaint determinations, and compares their terms to the alcohol industry's ABAC Scheme.

CHAPTER 5

Research methods

This chapter describes the types of data and methods of analysis used in my thesis research. Although this thesis compares tobacco, food and alcohol advertising regulation, I focused my empirical research on the food and alcohol industries. These two industries play an active role in advertising regulation, while the tobacco industry does not. I used two main sources of data for my study: public documents on food and alcohol advertising regulation, and semi-structured in-depth interviews with key stakeholders. Accordingly, my study draws on a mixed-method research design. I describe some of the issues involved in conducting research on large and powerful companies, as well as accessing business elites for interviews. The chapter concludes by briefly outlining the content of the substantive chapters of the thesis, and signposting the different ways in which data are used in each chapter.

1. Document analysis

I conducted a close analysis of regulatory instruments that apply to food and alcohol advertising, most importantly industry codes of conduct. I also examined documents produced by food and alcohol manufacturers and quick service restaurants, including social responsibility reports, company action plans written to meet the requirements of the RCMI and QSRI, annual reports and company-owned websites. In addition, I analysed documents produced by the bodies that administer advertising self-regulation, including the ABAC Management Committee and the Australian Food and Grocery Council (AFGC). I performed a detailed case analysis of complaint determinations concerning food and alcohol advertising directed to children, the results of which are reported in Chapter 6. Finally, I analysed government documents that reviewed or reported on food and alcohol advertising self-regulation, including those produced by the Australian National Preventive Health Agency (ANPHA) and the Australian Communications and Media Authority (ACMA). Table 9 summarises the types of documents used in my research, and provides examples of key texts.

Table 9. Key texts analysed in the thesis

Author	Type of document	Example
Industry associations	Advertising codes of conduct	<i>The Responsible Children’s Marketing Initiative (RCMI).</i>
		<i>The Quick Service Restaurant Industry Initiative for Responsible Marketing and Advertising to Children (QSRI).</i>
	Annual reports on the operation of advertising codes	<i>The Alcohol Beverage Advertising (and Packaging) Code (ABAC).</i>
		ABAC Annual Report. RCMI Activity Report.
Complaints hearing bodies	Advertising complaint determinations	Advertising Standards Board determinations on food advertising directed to children.
		ABAC Adjudication Panel complaint determinations on alcohol advertising’s appeal to children.
Companies	Social responsibility reports	<i>PepsiCo Performance with Purpose Sustainability Summary 2010.</i>
	Internal advertising codes	<i>Diageo Marketing Code: Promoting Responsible Drinking</i>
	RCMI and QSRI company action plans	<i>Nestlé The Responsible Children’s Marketing Initiative Company Action Plan.</i>
Government agencies	Review of food industry-self regulation	<i>Industry Self-Regulation of Food and Beverage Advertising to Children: ACMA Monitoring Report.</i>
	Review of alcohol industry self-regulation	<i>Review of the Self-Regulatory System for Alcohol Advertising</i> by the National Committee for the Review of Alcohol Advertising.
	Documents on nutrition policy and chronic disease prevention	<i>Australia: The Healthiest Country by 2020. Report of the National Preventive Health Taskforce.</i>

2. Interviews

Recruitment

I supplemented document analysis with interviews intended to provide in-depth detail on how companies complied with advertising regulation, as well as their perspectives on the strengths and limitations of industry self-regulation. I undertook purposive sampling for the interview component of my research. Initially I focused on food and alcohol industry actors that participate in the advertising regulatory system. I contacted the AFGC to ask their staff to participate, and to request their assistance with recruiting representatives of RCMI and QSRI companies for interviews. The AFGC was receptive to my inquiries and agreed to participate in the study, and to help with recruitment. I contacted the three alcohol industry trade associations that are involved in the ABAC Scheme, as well as the ABAC Management Committee. The alcohol trade associations declined to participate in my research unless the Committee did so as well. Their reluctance was because the chief executive of each of the trade associations sits on the Management Committee. The relationships between the trade associations and the Management Committee made it a powerful gatekeeper that determined my access to other alcohol industry actors.¹ This was also true of the AFGC, but it affected my research to a lesser extent as the AFGC was more cooperative than the ABAC Management Committee.

The ABAC Management Committee initially refused to participate in my study. In fact, a representative of the Committee emailed other individuals with an interest in the ABAC Scheme and asked them not take part in my research. However, after contacting the Committee I wrote to the ABAC Adjudication Panel, representatives of which agreed to be interviewed. At this point, the Management Committee and the three alcohol industry bodies agreed to participate in the study. The alcohol industry's defensive reaction to my research seemed to be related to its history of interactions with public health researchers. The ABAC has been subject to numerous evaluations by government bodies and independent researchers, several of which have produced serious critiques of the scheme.² There is also pronounced animosity between some alcohol researchers and sectors of the alcohol industry. Accordingly, industry actors were concerned about my motivations and whether I would simply reproduce the criticisms of other researchers. In contrast, research on self-regulation of food advertising

¹ Alan Bryman, *Social Research Methods* (Oxford University Press, 4th ed, 2012) 139.

² See the discussion in Chapter 10.

was relatively new at the start of my study. Perhaps for this reason the AFGC seemed more open to my research, and believed that my findings could reflect positively on the industry.

In order to recruit RCMI and QSRI participants, I asked the AFGC to send an email on my behalf to all signatory companies, asking if a company representative could take part in an interview. Following this email, two RCMI companies (out of 17 signatories) contacted me to be interviewed, and one quick service restaurant chain (out of four companies) also agreed to participate.³ I used a publicly available list of signatory companies to follow up the AFGC's email with a letter from my supervisor requesting interview participants, followed by four to five telephone calls if there was no initial reply. This process resulted in another six RCMI companies agreeing to be interviewed for the study. The alcohol trade associations largely refused to assist with recruiting alcohol manufacturers for me to interview, so I used their websites to identify wine makers, breweries and distilled spirits producers that are subject to the ABAC. I contacted 20 companies in total, of whom five agreed to be interviewed.

In relation to the food industry I was only interested in companies that had joined the RCMI and QSRI, meaning that I could not broaden my pool of potential participants. Although there were more potential interviewees in the alcohol industry, time constraints limited my recruitment efforts. I struggled to recruit both food and alcohol manufacturers for the study, with some companies refusing to participate and others simply failing to return my calls. However, I am grateful to those companies that agreed to be interviewed, particularly considering the risk that I would be critical of their industry's implementation of self-regulation.

When I became concerned that I would not be able to recruit enough food and alcohol industry participants, I re-designed the study to include other key stakeholders in food and alcohol advertising regulation. I recruited representatives from the advertising industry bodies involved in the advertising self-regulatory system, specifically the Communications Council, the Australian Association of National Advertisers and the Advertising Standards Bureau. I also interviewed a senior executive at ANPHA, as it monitors and evaluates food and alcohol advertising regulation. I approached the ACMA, but this agency declined to participate. I recruited informants from public health organisations, as well as academics with an interest in food or alcohol advertising regulation. In total, eleven public health representatives agreed to

³ Seven quick service restaurant chains participate in the QSRI (Chicken Treat, Hungry Jack's, KFC, McDonald's Australia, Oporto, Pizza Hut and Red Rooster) but these are owned by four companies (QSR Holdings, Hungry Jack's, McDonald's Australia and Yum! Brands).

be interviewed. During the recruitment process, I visited England for a conference, and I used this trip as an opportunity to speak with the UK government broadcasting authority, OfCom, and members of the Advertising Standards Authority and the Committee of Advertising Practice – the two main bodies involved in advertising industry self-regulation in the UK.⁴ Although this interview data does not make a large appearance in my thesis, it proved useful to gaining an understanding of the UK advertising regulatory system, which I have used as a point of contrast to the Australian regulatory scheme in Chapter 11.

In total, I interviewed 39 individuals from 35 organisations. Twenty-one participants were women and 18 were men. All interviewees were senior within their organisation, with most holding senior executive positions such as director or manager of a particular business or organisational unit. Interviewees were based in all six Australian states, as well as the Australian Capital Territory. Twelve interviewees were located in Sydney, eight in Canberra five in Melbourne and four in London (UK), with the remainder being spread across Australia. Table 10 below provides an overview of the different groups of participants that I interviewed and how many interviews I conducted in each sector.

Of the 11 commercial companies involved, all were of a significant size, with 100 to 85,000 employees in Australia. All but two companies were part of larger multinational organisations that operated in numerous countries and employed thousands of people. The food manufacturers had diverse product ranges, which included savoury and sweet baked goods, chocolate and confectionery products, dairy products, frozen and canned goods, pre-prepared meals and non-alcoholic beverages. Because the alcohol industry is dominated by a small number of large manufacturers, I cannot disclose the specific sectors of the industry from which my interview participants were drawn. In some parts of the industry there are only a handful of significant players, so this information could identify which companies participated in the study, in breach of the guarantee of confidentiality given to these informants.

⁴ I also discuss these organisations in Chapter 11. Very briefly, OfCom is the UK government's communications regulator, operating under the *Communications Act 2003* (UK). It co-regulates with the Advertising Standards Authority, an independent organisation established by the advertising industry to administer its codes of conduct. These codes are written by the Broadcast Committee of Advertising Practice and the Committee of Advertising Practice, comprising representatives of advertisers, media agencies, media owners and other industry groups. See OfCom, *About* (undated) <<http://www.ofcom.org.uk/about/>>; Committee of Advertising Practice, *Our Committees* (2013) <<http://www.cap.org.uk/About-CAP/Who-we-are/Our-committees.aspx>>; Advertising Standards Authority, *About ASA* (2013) <<http://www.asa.org.uk/About-ASA.aspx>>.

Table 10. Type and number of organisations participating in the research

Type of organisation	Sector	No. of organisations that participated	Total number of interviewees
Companies			
	Food manufacturers	7	8
	Alcohol companies	4	4
Industry bodies			
	Food industry	1	2
	Alcohol industry	4	6
	Advertising industry (UK and Australia)	6	6
Public health groups			
	General	4	4
	Obesity specific	3	3
	Alcohol specific	4	4
Government agencies			
	Australia	1	1
	UK	1	1
Total		35	39

Researching self-regulation

The difficulties I experienced accessing food and alcohol industry interviewees point to more fundamental problems related to obtaining information on self-regulation. Government regulatory agencies are subject to accountability requirements that authorise or mandate them to publicly disclose enforcement and compliance information.¹ Researchers can also use freedom of information legislation to acquire information on the activities of public bodies. In contrast, the increasing use of private regulation places a growing amount of data in the hands of businesses, industry associations and civil society actors, who are not obligated to release information into the public domain in the same manner as public agencies.² Thus, conditions of ‘regulatory capitalism’ make it more difficult for researchers to gain access to information about regulatory systems, particularly where self-regulation makes no provision for the public disclosure of information about its operation. However, where industries point to their own voluntary programs as fulfilling a public purpose (and as eliminating the need for government regulation), then it is entirely appropriate that those initiatives be rigorously examined in terms of whether they embody the features of good governance.

As I discuss in Chapter 7, food and alcohol advertising regulation contain some mechanisms for data collection and disclosure. However, as with many other forms of self-regulation, the main source of information on corporate compliance with the RCMI and QSRI is company self-reports.³ Concerns can be raised about the reliability and validity of the data obtained from self-reports, because firms may refuse to disclose commercially sensitive information or discuss serious instances of non-compliance that tarnish their reputation.⁴ If regulation is to be responsive to business compliance, it is important that there be independent evaluation of corporate behaviour;⁵ yet the fact that food and alcohol companies retain a large degree of control over information about their self-regulatory practices makes this difficult. The lack of independent information on the implementation of food and alcohol industry advertising codes illustrates one of the limitations of these regulatory systems, namely the lack of

¹ Christine Parker and Vibeke Nielsen, 'The Challenge of Empirical Research on Business Compliance in Regulatory Capitalism' (2009) 5 *Annual Review of Law and Society* 45. 59.

² Ibid 59.

³ Ibid.

⁴ Ibid 61-63.

⁵ Ibid 46.

objective criteria by which to evaluate the schemes' effects, as well as systematic monitoring of the schemes against these criteria.⁶ I discuss this problem further in Chapter 7.

Data reliability

I attempted to ensure the rigour of my data through a process of triangulation.⁷ I compared interview data to publicly available documents on companies' compliance practices. I also compared my findings on companies' implementation of the RCMI to those of the independent review of the scheme, conducted in 2012.⁸ The independent review of the RCMI used a similar methodology to my own, but the reviewer had access to all of the code signatories, as well as to advertising industry bodies and the AFGC. Additionally, I referred to the findings of a separate independent report on the QSRI, produced in 2011.⁹ However, both of these reviews relied upon information provided by participants themselves, i.e. the reviewers did not have access to an independent source of data on signatories' advertising and compliance practices. My study also relied on self-reports and information provided in interviews with company representatives. To the extent that my findings match those of the independent reviews, it may simply mean that the same limitations are found in all three data sets.¹⁰

Further, it should not be assumed that combining data from multiple sources will generate an objective 'truth' about self-regulatory processes, nor enhance the validity of research.¹¹ To begin with, texts are socially situated and written for an intended purpose and to convey a particular impression about the author.¹² The documents I analysed may produce a different perspective to the interview data because they were written for a different purpose to this

⁶ See also Lesley King et al, 'Industry Self-Regulation of Television Food Advertising: Responsible or Responsive?' (2011) 6(2 pt 2) *International Journal of Paediatric Obesity* e390 <<http://onlinelibrary.wiley.com/doi/10.3109/17477166.2010.517313/full>>; Lesley King et al, 'Building the Case for Independent Monitoring of Food Advertising on Australian Television' (2012) (*FirstView Article*) *Public Health Nutrition* 1 <<http://journals.cambridge.org/action/displayAbstract?fromPage=online&aid=8706977>>; Belinda Reeve, 'Private Governance, Public Purpose? Assessing Transparency and Accountability in Self-Regulation of Food Advertising to Children' (2013) 10(2) *Journal of Bioethical Inquiry* 149.

⁷ Norman K Denzin, *The Research Act in Sociology: A Theoretical Introduction to Sociological Methods* (Butterworths, 1970) ch 10; Nigel G Fielding and Jane L Fielding, *Linking Data* (Sage, 1986) 23-53.

⁸ Susannah Tymms, 'Responsible Advertising to Children: An Independent Review of the Australian Food and Beverage Industry Self-Regulatory Codes' (AGFC, October 2012) <<http://www.afgc.org.au/industry-codes/advertising-to-children/rcmi/rcmi-reports-2009.html>>.

⁹ Healthy Kids Association, *Final Report on the Compliance of Signatories to the Australian Quick Service Restaurant Industry Initiative for Responsible Advertising to Children* (2011) Australian Food and Grocery Council <<http://www.afgc.org.au/tools-guides-.html>>.

¹⁰ Parker and Nielsen, above n 5, 63. See also Fielding and Fielding, above n 11, 31.

¹¹ Fielding and Fielding, above n 11, 35; Norman K Denzin and Yvonna S Lincoln, *Handbook of Qualitative Research* (Sage, 2nd ed, 2000) 5.

¹² Bryman, above n 1, 510.

thesis. However, by combining interview data with document analysis, I aim to produce a richer and more detailed picture of the workings of advertising self-regulation.¹³

When I discussed my research with my colleagues, friends and family, they often questioned whether food and alcohol industry participants told me ‘the truth’ about the industry’s practices. Some people thought I was getting little more than the ‘official line’ on regulatory compliance.¹⁴ This is particularly the case considering that senior executives ‘are often expected to speak on behalf of a formal organisation – even to speak as if they were the organisation’.¹⁵ Business elites may also receive media training in how to avoid answering questions.¹⁶ It is certainly the case that participants offered me only a partial view of how their organisation operated, not necessarily because they set out to deliberately deceive me, but because they occupied a certain position within that organisation and did not know how other units operated, or because they held different perspectives to their colleagues.¹⁷ However, I saw little reason for participants to try and mislead me. Although interviewees may have had an interest in enhancing the reputation of their industries, participation in the research offered them and their company few direct benefits (particularly considering that participant companies remained anonymous) and presented potential threats to the industry’s reputation.

From another perspective, questions about truth telling in interviews are irrelevant to my research. I assume there is no one objective ‘truth’ about the effects of food and alcohol advertising regulation that can be accessed through social research.¹⁸ The goal of my interviews was to gain a greater understanding of how participants understood self-regulation and interpreted its effects.¹⁹ A related point is that participants gave the impression that they

¹³ Fielding and Fielding, above n 11, 33.

¹⁴ See also Catherine Welch et al, ‘Corporate Elites as Informants in Qualitative International Business Research’ (2002) 11(5) *International Business Review* 611, 615.

¹⁵ Robert J Thomas, ‘Interviewing Important People in Big Companies’ (1993) 22(1) *Journal of Contemporary Ethnography* 80, 85.

¹⁶ William S Harvey, ‘Strategies for Conducting Elite Interviews’ (2011) 11(4) *Qualitative Research* 431, 438.

¹⁷ Ayres and Braithwaite describe how corporate organisations are not monolithic entities, but have multiple units, sub-units and employees with varying motivations and goals. Individuals can also be separated into various ‘selves’, with differing commitments to regulatory goals. This suggests that individuals and corporate departments can respond in a range of ways to regulatory requirements, depending upon their location within the organisation and their individual values and motivations. See Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Regulation Debate* (Oxford University Press, 1992) 20-35. Christine Parker also discusses internal organisational dynamics and the influence of organisations on individuals’ commitment to compliance. See *The Open Corporation: Effective Self-Regulation and Democracy* (Cambridge University Press, 2002) 32-37, and the discussion in Chapter 4 of this thesis.

¹⁸ See Jody Miller and Barry Glassner, ‘The “Inside” and the “Outside”: Finding Realities in Interviews’ in David Silverman (ed), *Qualitative Research: Theory, Method and Practice* (Sage, 2004) 125.

¹⁹ See Bryman, above n 1, 380.

genuinely believed that their company acted responsibly. Some informants went to great lengths to demonstrate this to me, for example by showing me corporate policy documents and advertising schedules and describing their operation. The view of industry participants seemed to reflect a different perspective to public health participants on what self-regulation should aim to achieve, where the responsibilities of parents and companies lay in relation to children's viewing and eating habits, as well as on the connections between advertising and obesity. In other words, what participants told me made sense or was credible according to their belief systems and normative assumptions. Thus, I take interviewees to be telling me the 'truth' (or their 'truth') about compliance practices, as far as they know it.²⁰ However, taking this position does not mean that I cannot critically evaluate interviewee's narratives; hence my use of comparative sources of data as a way of presenting multiple (and sometimes conflicting) perspectives on self-regulation.

Data collection

I developed semi-structured interview schedules to guide interactions with participants. I created interview schedules that were specific to the individual or organisation being interviewed, but the questions fell into the following general categories:

- The participants' role in the regulatory system;
- What they understood to be the rationale for adopting self-regulation in their company or industry;
- Whether they thought self-regulation worked effectively, and if so why;
- Whether they perceived self-regulation to have any limitations, and whether there were any ways in which the scheme could be strengthened; and
- Whether there should be greater government involvement in food or alcohol advertising regulation, and if so, in what ways.

In the interviews with food and alcohol company representatives, I questioned participants on how their company implemented advertising codes, and any challenges the company experienced in doing so. Interviews were conducted in-person where possible, although nine were conducted by telephone, sometimes because of the time and expense involved in travelling to visit the interviewee, or when the interviewee requested it. One participant

²⁰ See Miller and Glassner, above n 22.

emailed answers to my questions, but did not want to be interviewed over the telephone or face-to-face. All other interviews were audio-taped with participant consent.

Ethics and consent

I obtained permission to undertake the research from the University of Sydney's Human Research Ethics Committee. The interviews were conducted in accordance with the ethics requirements set by the Committee. I secured written consent from participants to the interview, and assured participants that:

- Interviewees were speaking on behalf of their organisation (in the case of industry trade associations, regulatory bodies or government agencies) and that interviewees themselves would not be identified in reports of the data;
- For interviews with companies and public health actors, that both the organisation and the interviewee would remain anonymous, and all identifying details would be removed in reports of the data; and
- Participation was entirely voluntary and the interviewee could withdraw from the study at any point.

In addition, all material was stored in a secure location at the University of Sydney, and made available only to me.

There is a growing concern for research organisations to demonstrate their ethical credentials. This is done in order to protect research participants from harm, but also to protect the institution from any reputational and legal risks associated with researchers behaving unethically.²¹ In the social sciences, ethics requirements draw upon a framework developed from biomedical research.²² This framework assumes that participants are in a position of vulnerability compared to researchers, and need to be protected from exploitation or harms that might result from their involvement in the research, as well as from being coerced into participating in research.²³ However, this model of ethics does not fit well with some social

²¹ See Bryman, above n 1, 131; Maurice Punch 'Politics and Ethics in Qualitative Research' in Norman K Denzin and Yvonna S Lincoln (eds), *Handbook of Qualitative Research* (Sage Publications, 1994) 83; Will C Van Den Hoonaard, 'Is Research-Ethics a Moral Panic?' (2001) 38(1) *Canadian Review of Sociology and Anthropology* 19.

²² Rachel Aldred, 'Ethical and Political Issues in Contemporary Research Relationships' (2000) 42(5) *Sociology* 887, 888.

²³ See, e.g., National Health and Medical Research Council, Australian Research Council and Australian Vice-Chancellor's Committee, 'National Statement on Ethical Conduct in Human Research' (Australian Government, 2007) s 2 <<http://www.nhmrc.gov.au/guidelines/publications/e72>>.

science research, particularly studies of powerful business elites (such as senior managers and executives) and large organisations.²⁴ This type of research often involves a power imbalance that favours the research subject rather than the researcher.²⁵ Accordingly, researchers have to consider a different set of ethical considerations than those found in studies of marginalised social groups - a traditional concern of sociological research.²⁶ They may have to protect their study from conflicts of interest and affiliation bias, particularly where it is funded by corporate organisations.²⁷ They may also face attempts by industry or government to obstruct or influence the conduct of the research, including any resulting publications.²⁸

Such issues arose in relation to my interviews with elites representing food and alcohol companies. First, I encountered difficulties in accessing these individuals. As a PhD student I had few means by which to convince anyone to participate in the study. Although participation could provide reputational benefits to the interviewee's industry, it could also expose irresponsible advertising practices, and negative findings risked generating further criticism of the industry. The large, powerful organisations that I targeted for interviews often had multiple 'lines of defence' in place for controlling access to staff members and to corporate information.²⁹ For example, I often encountered layers of gatekeepers from whom I had to seek permission to interview a particular employee. I was also at a power disadvantage during the interview process itself, given my lesser social standing as a student and the age gap between myself and the interviewee.³⁰ In some interviews I found it difficult to ask critical or demanding questions, and to challenge interviewee's assertions about the success of self-regulation, or the ethics of their advertising practices.³¹ On the other hand, the fact that I was a young student and an 'outsider' may have encouraged informants to provide a fuller account of the relevant issues than they would have if I was more senior or had a background in public health, or food and alcohol policy research.

At one point in the recruitment process, the AFGC proposed that my PhD research form part of an independent review of the food industry codes. To my mind, this immediately raised

²⁴ Aldred, above n 26, 888.

²⁵ Ibid; Emma Bell and Alan Bryman, 'The Ethics of Management Research: An Exploratory Content Analysis' (2007) 18(1) *British Journal of Management* 63.

²⁶ Bell and Bryman, above n 29, 66-67.

²⁷ Ibid.

²⁸ See, e.g., Susan A Ostrander, "'Surely You're Not in This Just to Be Helpful": Access, Rapport and Interviews in Three Studies of Elites' (1993) 22(1) *Journal of Contemporary Ethnography* 7, 14; Neil Pearce, 'Corporate Influences on Epidemiology' (2008) 37(1) *International Journal of Epidemiology* 46.

²⁹ Robert J Thomas, above n 19, 82.

³⁰ Welch et al, above n 18, 615.

³¹ Ibid. See also Ostrander, above n 32, 18-22.

questions about protecting the independence and integrity of my research. I approached the research office at the University of Sydney, as well as the unit responsible for industry partnerships. However, I found little guidance on whether it was desirable for me to conduct the review and if I did so, what steps I should take to safeguard my research from any form of undue influence.³²

In the end, my supervisor and I drafted some preliminary conditions that would apply if I conducted the independent review. The AFGC eventually decided to use an independent consultant, and this incident had few practical repercussions for my thesis. Further, the fact that the AFGC considered my involvement may have helped me obtain access to food industry participants. However, my experiences may suggest that ethical guidelines need to account for the full range of research relationships and power relations encountered by researchers, as well as the political processes of gaining access to powerful interviewees.³³

Data management and analysis

I transcribed interviews verbatim and analysed the resulting data manually, rather than with the assistance of data management software, mostly because of personal preference and resource constraints. I had a relatively small number of interview transcripts (37 in total), making it easier to manage the data manually than if I had a larger group of interviewees. Participants fell into several distinct groups (including representatives from businesses, trade associations, health organisations and government agencies) and in many cases I was identifying themes in the interviews within each group rather than between them. This also made manual coding more manageable than if I was running a project with large numbers of participants and a large amount of complex coding and data annotation.

I used a general inductive approach in my analysis, drawing upon models developed by David Thomas,³⁴ Nigel King and Christine Horrocks,³⁵ and David Silverman.³⁶ This approach is not tied to a specific 'tradition' or theory, although it draws upon many of the analytical techniques used in grounded theory, namely inductive coding, the development of

³² See also Ostrander, above 32.

³³ See Aldred, above n 26, 984. See also Punch, above n 25.

³⁴ David R Thomas, 'A General Inductive Approach for Analysing Qualitative Evaluation Data' (2006) 27(2) *American Journal of Evaluation* 237.

³⁵ Nigel King and Christine Horrocks, *Interviews in Qualitative Research* (Sage, 2010).

³⁶ David Silverman, *Interpreting Qualitative Data: Methods for Analysing Talk, Text and Interactions* (Sage, 3rd ed, 2006).

categories and memo writing.³⁷ However the general inductive approach differs to grounded theory in that the coding process is less formal, for example it does not divide the analytic process into open and axial coding.³⁸ It also allows for a deductive component in the analysis, in that the research design, collection and analysis of the data are guided by specific research questions that derive from a theoretical concern.³⁹ This approach accorded with the overall aim of my research, which was to evaluate the theory of responsive regulation, within the context of food advertising to children, rather than to build a detailed theoretical model inductively from the data.

The basic characteristics of my analytic approach were multiple close readings of the text to identify themes that emerged from the data; the creation of codes that reflected these themes; linking codes to create an explanatory model or framework; and the use of memos describing the themes in more depth.⁴⁰ I began with an initial process of ‘deductive’ coding based on the schedule and the objectives of my research (for example, ‘steps taken to implement self-regulation’).⁴¹ I also coded ‘inductively’ by coding for themes that spontaneously arose out of participants’ narratives. For example, I coded data that discussed the links between advertising and obesity because many participants offered their opinion on this topic, despite the fact that I did not ask a question on it specifically. A second coding step focused on grouping together descriptive codes that shared a common meaning under interpretive or ‘inferential’ codes, which drew data together into more meaningful units of analysis (for example, ‘justifying self-regulation’).⁴² A third stage involved identifying overarching themes that captured key concepts in the analysis (for example, ‘form of regulation’).⁴³ The final step in my analysis was to build a framework that linked important themes and categories in the data and related my findings back to responsive regulation.⁴⁴

3. Subsequent chapters

Chapters 6 to 11 report on the substantive findings of my research, based on the factors outlined in the framework in Chapter 4. I use the data from my analysis in different ways in

³⁷ See Barney G Glaser and L Anselm Strauss, *The Discovery of Grounded Theory: Strategies for Qualitative Research* (Weidenfeld and Nicolson, 1967).

³⁸ David R Thomas, above n 38, 240-241.

³⁹ Ibid 240. See also Robert K Yin, *Case Study Research: Design and Methods* (Sage, 4th ed, 2009) 35.

⁴⁰ David R Thomas, above n 38, 241-242.

⁴¹ King and Horrocks, above n 39, 152.

⁴² Ibid 15.

⁴³ Ibid 156; David R Thomas, above n 38, 242.

⁴⁴ David R Thomas, above n 38, 240.

each of the chapters. Chapter 6 critiques the content of food and alcohol advertising codes, while Chapter 7 analyses the regulatory processes established by food and alcohol industry self-regulation. These chapters rely solely on documentary analysis, particularly of the code documents themselves, as well as advertising complaint determinations (in Chapter 6). Chapter 8 describes the institutional context of food and alcohol advertising regulation. This chapter relies heavily upon the documentary analysis, but also makes reference to relevant interview data in some places. In Chapter 9 I report on the steps taken by food and alcohol manufacturers to implement advertising codes of conduct. This chapter is based almost entirely on interviews with food and alcohol companies, although I also make reference to the independent review of food industry self-regulation, as well as corporate social responsibility literature produced by food and alcohol companies. Chapters 10 and 11 describe government and public health involvement in food and alcohol industry advertising initiatives. These final chapters draw upon a mixture of interview and documentary data. The conclusion of the thesis summarises my findings and their implications for strengthening food industry self-regulation.

CHAPTER 6

The content of food and alcohol advertising codes

Food industry self-regulation has two basic components: a code of practice setting out guidelines for marketing to children, and processes for establishing, monitoring and enforcing the code.¹ This chapter examines the substantive content and coverage of the two main food industry initiatives regulating food advertising (the RCMI and QSRI),² while the subsequent chapter explores the self-regulatory processes established by the codes. I also compare the RCMI and QSRI to the *Alcohol Beverages Advertising (and Packaging) Code (ABAC)*.³ After an outline of the food and alcohol industry codes, with a specific focus on advertising to young audiences, I discuss the meaning of ‘children’ and the definition of media ‘directed primarily to children’ contained in the RCMI and QSRI. I describe how these initiatives also apply to advertising content that is ‘directed primarily to children’. I compare this aspect of the codes to the ABAC’s provisions on alcohol advertising with strong or evident appeal to children.⁴ Next I consider the communication channels and persuasive techniques covered by each code and describe the RCMI and QSRI’s application to a sub-set of unhealthy food products. The final section of the chapter considers the advertising messaging requirements of the food industry initiatives. The major conclusion reached in the chapter is that the codes contain a number of loopholes that undermine their impact on children’s exposure to unhealthy food advertising. Thus, throughout the chapter I comment on the potential to strengthen the codes and the feasibility of such improvements happening through self-regulation.

As described in Chapter 2, the Advertising Standards Board (ASB) hears complaints from the public about food advertising. I used the ASB’s determinations under the RCMI and QSRI to

¹ C Hawkes, 'Self-Regulation Of Food Advertising: What It Can, Could And Cannot Do To Discourage Unhealthy Eating Habits Among Children' (2005) 30(4) *Nutrition Bulletin* 374.

² Australian Food and Grocery Council, *The Responsible Children's Marketing Initiative of the Australian Food and Beverage Industry* (March 2011) <<http://www.afgc.org.au/industry-codes/advertising-to-children/remi.html>>; Australian Quick Service Restaurant Industry, *Initiative for Responsible Advertising and Marketing to Children* (June 2009) Australian Association of National Advertisers <<http://www.aana.com.au/QuickServiceRestaurantInitiative.htm>>.

³ The ABAC Scheme Limited, *Alcohol Beverages Advertising (and Packaging) Code* (March 2012) <<http://www.abac.org.au/publications/thecode/>>.

⁴ *Ibid* pt 1 (a)(ii), (b).

analyse the codes' key terms and definitions.⁵ I obtained key concepts and definitions from complaint determinations because the codes themselves are vague and open to interpretation. Accordingly, they must be read in the context of the ASB's determinations, which are the major source of substantial definitions for the initiatives. I considered complaints determinations made between 2009 (when the codes were introduced) and 2012, but not those from 2013. This is because the food industry amended both initiatives in 2012, to take effect from June 2013.⁶ This means that the ASB will decide some complaints made in 2013 using different criteria. Analysing complaint determinations under the new versions of the codes would add an extra layer of complexity to what is already a technical and confusing scheme. Thus, I describe the changes to the wording of the RCMI and QSRI, but not the details of complaints made under the revised versions of the codes.

My analysis of the ABAC draws upon complaint determinations made by the ABAC Adjudication Panel concerning advertising's appeal to children.⁷ Unlike food industry self-regulation, the ABAC covers matters other than advertising directed to children. However, its provisions on alcohol advertising's appeal to children are comparable to the RCMI and QSRI. While food and alcohol codes contain similar restrictions on advertising directed to, or appealing to children, their complaint determination procedures differ quite substantially. The ABAC Panel produces detailed determinations that explore the reasoning behind its decision, the limitations of the ABAC Scheme and the public policy considerations underpinning the code. In contrast, the ASB's determinations tend to be shorter and less detailed and the ASB does not provide a rationale for its final decision. Because of the similarities between the food and alcohol codes, an analysis of the ABAC Panel's determinations may point to problems with food industry self-regulation that are not discussed in the ASB's more limited determinations.

Table 11 summarises the decisions I used from the ASB and the ABAC Adjudication Panel. From 2009 to 2012 the ASB determined a total of 61 complaints under the RCMI and QSRI.

⁵ The ASB's determinations are available from the Advertising Standards Bureau's website: <<http://www.adstandards.com.au/casereports/determinations>>.

⁶ See Australian Food and Grocery Council, *Australian Food and Grocery Council Position Statement in Response to Responsible Advertising to Children: An Independent Review of the Australian Food and Beverage Industry Self-Regulatory Codes* (1 November 2012) <<http://www.afgc.org.au/industry-codes/advertising-to-children/rcmi/rcmi-reports-2009.html>>; Australian Food and Grocery Council, *AFGC QSRI Initiative for Responsible Advertising and Marketing to Children* (2013) <<http://www.afgc.org.au/industry-codes/advertising-to-children/qsr-initiative.html>>.

⁷ The ABAC Adjudication Panel's determinations are available on the ABAC Scheme's website: <<http://www.abac.org.au/publications/adjudication-decisions/>>.

Of these, the ASB upheld ten complaints and dismissed 51. During this period, the ABAC Adjudication Panel considered 61 complaints on advertising’s appeal to children and/or advertising which encouraged underage drinking. It upheld 22 of these complaints and dismissed 39. The purpose of this chapter is not to critique the complaints-handling process itself, nor to quantify the number of complaints received by the two bodies, as is the approach in other studies of advertising regulation.⁸ Rather, the chapter analyses the substance of complaint determinations in order to uncover the limitations and gaps of self-regulation of food and alcohol advertising, particularly as it applies to young audiences.

Table 11. Complaints to the ASB under the RCMi and QSRI, and complaints to the ABAC Adjudication Panel concerning advertising’s appeal to children, or encouraging underage drinking

Year	RCMI/QSRI determinations			ABAC determinations (concerning appeal to children/underage drinking)		
	Upheld	Dismissed	Total	Upheld	Dismissed	Total
2009	2	1	3	3	13	16
2010	4	14	18	3	8	11
2011	3	15	18	7	4	11
2012	1	21	22	9	14	23
Total	10	51	61	22	39	61
%	16.4	83.6	100	36	64	100

⁸ See, e.g., J J Boddewyn, *Advertising Self-Regulation and Outside Participation: A Multinational Comparison* (Quorum Books, 1988); Michael Volkov, Debra Harker and Michael Harker, 'Complaint Behaviour: A Study of the Differences Between Complainants About Advertising in Australia and the Population at Large' (2002) 19(4) *Journal of Consumer Marketing* 319; Debra Harker, 'Towards Effective Advertising Self-Regulation in Australia: The Seven Components' (2003) 9(2) *Journal of Marketing Communications* 93; Rob Van Zanten, 'Consumer Complaints Against Alcohol Advertisements: An Evaluation' 2005 17(3) *International Journal of Wine Marketing* 25.

1. An outline of the food and alcohol industry codes

The RCMI and QSRI

The RCMI's core principle prohibits the promotion of food and beverage products to children under 12 in media unless:⁹

1. Those products represent healthy dietary choices, consistent with established scientific or Australian government standards

And

2. The advertising and/or marketing communication activities reference, or are in the context of, a healthy lifestyle, designed to appeal to the intended audience through messaging that encourages:
 - Good dietary habits, consistent with established scientific or government criteria
 - Physical activities.

RCMI signatories use nutrient profile models to identify products that are 'healthier choices' and that can be advertised to children. The initiative permits companies to use either government or NGO developed models or their own 'in-house' nutrition criteria.¹⁰ Companies' own criteria must be based on nutrition research (as per the requirements of the core principle), but there are no processes in place for assessing whether these models are based on rigorous scientific studies, or that they set comparable standards to those contained in government or NGO nutrient profiling schemes.

The RCMI places restrictions on the use of certain advertising techniques to which children are vulnerable, namely popular personalities and characters; product placement; the use of products in interactive games; advertising in schools; and premium offers.¹¹

The QSRI takes the same form as the RCMI. According to the initiative's core principle, advertising or marketing communications to children under 14 for food and/or beverages must:¹²

- (a) Represent healthier choices (as determined by defined nutrition criteria) and/or
- (b) Represent a healthy lifestyle, designed to appeal to the intended audience through messaging that encourages:

⁹ Australian Food and Grocery Council, *Responsible Children's Marketing Initiative*, above n 2, 2.

¹⁰ *Ibid.* Companies must specify the criteria they are using in the company action plan they create to implement the core code document (*ibid* 1).

¹¹ *Ibid.*

¹² Australian Quick Service Restaurant Industry, above n 2, 1-2.

- (i) healthier choices, (as determined by the nutrition criteria), and
- (ii) physical activity.

Unlike the RCMI, the QSRI contains a nutrient profile model in an appendix to the main code document. This model sets out nutrient criteria that children's meals must meet if they are to be advertised to young audiences.¹³ It requires that children's meals comprise at least a main meal and a beverage, and not exceed maximum limits for energy, saturated fat, sugar and salt content.¹⁴

As with the RCMI, the QSRI restricts some advertising techniques that particularly appeal to children, including the use of products in interactive games, advertising in schools and premium offers.¹⁵ The code also contains requirements for on-pack nutrition labelling and the availability of nutrition information that are not included in the RCMI.¹⁶

The ABAC

Chapter 2 outlined the main provisions of the ABAC, which include conditions on alcohol advertising's appeal to children. Section (a)(ii) of Part 1 of the code prohibits advertisements for alcohol beverages that encourage under-age drinking.¹⁷ Section (b) requires that alcohol advertising not have 'strong or evident appeal to children or adolescents'. Specifically,¹⁸

- i) Adults appearing in advertisements be over 25 years of age and clearly depicted as adults;
- ii) Children and adolescents depicted in advertisements must only appear in 'natural situations' (for example, a family barbecue) where there is no implication that they will consume or serve alcohol, and
- iii) Adults under the age of 25 years may only appear as part of a natural crowd or background scene.

¹³ Australian Food and Grocery Council, *Appendix 1 - Nutrition Criteria for Assessing Children's Meals* (2010) <<http://www.afgc.org.au/industry-codes/advertising-to-children/qsr-initiative.html>>.

¹⁴ Ibid. The QSRI nutrition criteria are based on the National Health and Medical Research Council's Nutrient Reference Values for Australia and New Zealand, and the 2007 Australian National Children's Nutrition and Physical Activity Survey. See National Health and Medical Research Council, 'Nutrient Reference Values for Australia and New Zealand Including Recommended Dietary Intakes' (Department of Health and Ageing and National Health and Medical Research Council, Australian Government, and Ministry of Health, Government of New Zealand, 9 September 2005) <<http://www.nhmrc.gov.au/guidelines/publications/n35-n36-n37>>; Commonwealth Scientific Industrial Research Organisation (CSIRO), Preventative Health National Research Flagship and the University of South Australia, *Children's Nutrition and Physical Activity Survey: Main Findings* (Commonwealth of Australia, 2008) <<http://www.health.gov.au/internet/main/publishing.nsf/Content/phd-nutrition-childrens-survey>>.

¹⁵ Australian Quick Service Restaurant Industry, above n 2, 2.

¹⁶ Ibid.

¹⁷ The ABAC Scheme Limited, *Alcohol Beverages Advertising (and Packaging) Code*, above n 3, pt 1(a)(ii).

¹⁸ Ibid pt 1 (b)(i)-(iii).

The ABAC applies these standards to the naming and packaging of alcohol products and to internet sites ‘primarily intended for advertising developed by or for producers or importers of alcohol products available in Australia... and to banner advertising of such products on third party sites’.¹⁹ A section on alcohol promotion at events obliges alcohol companies ‘to endeavour to ensure’ that the attendees of these events are over 18 years of age and that any promotional activities such as giveaways are only provided to persons of legal drinking age.²⁰ Having outlined the terms of the food industry initiatives and the ABAC, I turn to a close examination of the definitions and provisions contained in each code.

Food and alcohol codes’ definition of ‘children’

The RCMI defines ‘children’ as persons less than 12 years of age,²¹ while the QSRI applies to children who are under 14 years of age.²² The RCMI’s definition of children is consistent with food industry advertising codes in other jurisdictions,²³ but not with definitions found in other Australian advertising regulatory instruments. For example, the *Children’s Television Standards 2009* (CTS 2009) applies to children aged younger than 14 years of age.²⁴ The ABAC defines a child as ‘a person under 14 years of age’ and an adolescent as ‘a person aged 14-17 years’ inclusive’.²⁵ As young people under 12 years of age are most vulnerable to advertising, food advertising codes typically make this age the cut-off point for restrictions.²⁶ However, Chapter 1 described evidence that older children and adolescents (as well as adults) are also vulnerable to food advertising.²⁷ Further, ‘[m]arketing targeted at adults and teenagers often reaches children, meaning that a narrowly-defined age range may not fully

¹⁹ Ibid 3, pt 2.

²⁰ Ibid 3-4.

²¹ Australian Food and Grocery Council, *Responsible Children's Marketing Initiative*, above n 2, 4.

²² Australian Quick Service Restaurant Industry, above n 2, 3.

²³ Corinna Hawkes and Jennifer L Harris, 'An Analysis of the Content of Food Industry Pledges on Marketing to Children' (2011) 14(8) *Public Health Nutrition* 1403, 1406.

²⁴ Australian Communications and Media Authority, *Children’s Television Standards 2005* (at 11 July 2013) CTS 5. However, the *Commercial Television Industry Code of Practice* applies to ‘children of, or below primary school age,’ with Australian children traditionally finishing primary school around 12 years of age. Free TV, *2010 Commercial Television Industry Code of Practice* (at 11 July, 2013) cl 3.3.3.

²⁵ The ABAC Scheme, Alcohol Beverages Advertising (and Packaging) Code, above n 3, 1.

²⁶ Corinna Hawkes, 'Regulating and Litigating in the Public Interest: Regulating Food Marketing to Young People World Wide: Trends and Policy Drivers' (2007) 97(11) *American Journal of Public Health* 1962; Kathryn C Montgomery and Jeff Chester, 'Interactive Food and Beverage Marketing: Targeting Adolescents in the Digital Age' (2009) 45(3) *Journal of Adolescent Health* S18, S23-S24.

²⁷ See, e.g., Montgomery and Chester, above n 26; Jennifer L Harris, Kelly D Brownell and John A Bargh, 'The Food Marketing Defence Model: Integrating Psychological Research to Protect Youth and Inform Public Policy' (2009) 3(1) *Social Issues and Policy Review* 211.

protect younger children from the impact of marketing'.²⁸ Thus, public health advocates call for regulation of advertising to a wider range of ages, including children up to 16 years of age.²⁹

2. Media 'directed primarily to children'

The RCMI

To fall within the ambit of the RCMI, advertising must appear in media that are 'directed primarily to children', defined as the following:³⁰

.... 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 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.

Of the 61 complaints under the RCMI and QSRI from 2009 to 2012, 42 concerned television advertising. Thus, many determinations hinge on whether the relevant/associated television program is directed to children. Based on the definition above, the ASB uses three criteria to decide whether a television program is directed primarily to children. The first is its categorisation: C and P programs automatically fall within the scope of the RCMI. Second is the likely audience share of the program and the third is its content, i.e. whether the theme, language and visuals used in the program create the overall impression that it is designed specifically for children.

The vast majority of unhealthy food advertising takes place in general audience (G and PG) programming,³¹ meaning that the ASB rarely considers advertisements that appear in C and P

²⁸ World Health Organisation, 'A Framework for Implementing the Set of Recommendations on the Marketing of Foods and Non-Alcoholic Beverages to Children' (World Health Organisation, 2012) 12 <http://www.who.int/dietphysicalactivity/framework_marketing_food_to_children/en/>.

²⁹ See, e.g., S MacKay et al, 'A Comprehensive Approach to Protecting Children from Unhealthy Food Advertising' (Obesity Policy Coalition, 2011) 30 <<http://www.opc.org.au/whatwedo/policydocuments.aspx>>; Jennifer L Harris et al, 'Defining "Child-Directed Advertising" to Reduce Unhealthy Television Food Advertising' (2013) 44(4) *American Journal of Preventive Medicine* 358, 363.

³⁰ Australian Food and Grocery Council, *Responsible Children's Marketing Initiative*, above n 2, 1.

³¹ Kathy Chapman, Penny Nicholas and Rajah Supramaniam, 'How Much Food Advertising is there on Australian Television?' (2006) 21(3) *Health Promotion International* 172; Bridget Kelly et al, 'Television Food Advertising to Children: The Extent and Nature of Exposure' (2007) 10(11) *Public Health Nutrition* 1234; Bridget Kelly et al, 'Trends in Food Advertising to Children on Free-to-Air Television in Australia' (2011) 35(2) *Australian and New Zealand Journal of Public Health* 131; Lisa G Smithers, John W Lynch and Tracy Merlin, 'Television Marketing of Unhealthy Food and Beverages to Children in Australia: A Review of Published

programs. More often it will consider the audience share of general audience shows. However, there are no general audience programs where children comprise 50 per cent or more of the viewing audience, because they constitute a small proportion of the population overall.³² For example, despite being the highest rating programs for children aged between five and 12 years, *Junior Masterchef*, *Modern Family* and *The Simpsons* do not have a viewing audience of 50 per cent or more children. Accordingly, the ASB has held that they do not come within the RCMI's definition of 'media directed primarily to children'.³³ Thus, the RCMI does not apply to programs that are watched by a large number of child viewers, but where children do not make up the majority of the audience.³⁴ As a result, the code has little effect on children's overall exposure to unhealthy food advertising.³⁵ Further, the initiative's definition of audience share means that advertisers can circumvent the code's restrictions by advertising during family programs that are widely viewed by children, rather than in C and P programs.³⁶

Following the independent review of the RCMI, the AFGC agreed to revise the audience threshold down to 35 per cent, effective in June 2013.³⁷ This aligns the code with voluntary initiatives in other jurisdictions, including the US *Children's Food and Beverage Advertising*

Evidence from 2009' (Australian National Preventive Health Agency, October 2012) 38
<<http://www.anpha.gov.au/internet/anpha/publishing.nsf/Content/publications>>.

³² Australian Communications and Media Authority, 'Children's Viewing Patterns on Commercial, Free-to-Air and Subscription Television: Report Analysing Audience and Ratings Data for 2001, 2005 and 2006' (Australian Government, 2007)

<http://www.acma.gov.au/webwr/_assets/main/lib310132/children_viewing_patterns_commercial_free-to-air_subscription_television.pdf>. See also MacKay et al, above n 29, 11; Lesley A King et al, 'Consultancy Report on Inappropriate Food Marketing to the National Preventative Taskforce' (Institute of Obesity, Nutrition and Exercise, The University of Sydney, 2009) 12

<<http://www.preventativehealth.org.au/internet/preventativehealth/publishing.nsf/Content/engagement-and-consultation-11p>>.

³³ MacKay et al, above n 29, 24. See Advertising Standards Bureau, *Case Report 0441/10* (10 November 2010) <<http://www.adstandards.com.au/casereports/determinations>>; Advertising Standards Bureau, *Case Report 0439/10* (24 November 2010) <<http://www.adstandards.com.au/casereports/determinations>>; Advertising Standards Bureau, *Case Report 0052/11* (23 February 2011) <<http://www.adstandards.com.au/casereports/determinations>>.

³⁴ MacKay et al, above n 29, 11.

³⁵ Smithers, Lynch and Merlin, above n 31, 4. See also Lesley A King et al, 'Industry Self-Regulation of Television Food Advertising: Responsible or Responsive?' (2010) 6(2) *International Journal of Paediatric Obesity* e390 <<http://onlinelibrary.wiley.com/doi/10.3109/17477166.2010.517313/full>>; Lana Hebden et al, 'Advertising of Fast-Food to Children on Australian Television: The Impact of Industry Self-Regulation' (2011) 195(1) *Medical Journal of Australia* 20; Lesley King et al, 'Building the Case for Independent Monitoring of Food Advertising on Australian Television' (2012) (*FirstView Article*) *Public Health Nutrition* 1 <<http://journals.cambridge.org/action/displayAbstract?fromPage=online&aid=8706977>>.

³⁶ Harris et al, 'Defining "Child-Directed Advertising" to Reduce Unhealthy Television Food Advertising', above n 29, 359.

³⁷ Australian Food and Grocery Council, *Position Statement in Response to Responsible Advertising to Children: An Independent Review of the Australian Food and Beverage Industry Self-Regulatory Codes*, above n 6, 8.

Initiative (CFBAI).³⁸ However, this reduced threshold is unlikely to capture many more programs that are popular with children. One study quantified the amount of advertising viewed by children that was covered by the CFBAI, which applies to television programming with an audience share of 35 per cent or more children.³⁹ It found that approximately half of all food and beverage advertisements viewed by children were not subject to the code because they appeared during programming with an audience share of less than 35 per cent children.⁴⁰ Conversely, expanding the US code to cover programming with an audience share of 20 per cent or more children would capture 70 to 71 per cent of food advertising viewed by children.⁴¹ The revision of the RMCi does not, therefore, represent a significant concession by the food industry.

If a program is not directed to children according to its rating or audience share, the ASB will then examine whether the design of the program means that it is targeted to children. However, the ASB has only upheld three complaints on this basis. One complaint related to the placement of an advertisement for Oreo cookies in television programs that were clearly designed for young children, including *Dora the Explorer* and *Ben 10 Alien Force*.⁴² Two other complaints concerned advertisements located in 'family movies' such as *Robots*⁴³ and *Bee Movie*.⁴⁴ These movies screened in the early evening and had a large adult audience, so they did not meet the audience share requirement. However, their creative content was designed to be appealing to children, meaning that fell within the ambit of the RMCi. An appendix to the RMCi explicitly exempts a range of programs that children would find appealing, but which could be said to be designed for a general audience. They include *Malcolm in the Middle*, *Home and Away* and *Masterchef*.⁴⁵ This appears to be an additional,

³⁸ Susannah Tymms, 'Responsible Advertising to Children: An Independent Review of the Australian Food and Beverage Industry Self-Regulatory Codes' (AGFC, October 2012) 58 <<http://www.afgc.org.au/industry-codes/advertising-to-children/rcmi/rcmi-reports-2009.html>>. See Better Business Bureau, *Children's Food and Beverage Advertising Initiative* (2013) <<http://www.bbb.org/us/childrens-food-and-beverage-advertising-initiative/>>; EU Pledge, *Enhanced 2012 Commitments* (2013) <<http://www.eu-pledge.eu/content/enhanced-2012-commitments>>

³⁹ Harris et al, 'Defining "Child-Directed Advertising" to Reduce Unhealthy Television Food Advertising', above n 29.

⁴⁰ Ibid 361.

⁴¹ Ibid 362.

⁴² Advertising Standards Bureau, *Case Report 0409/10* (22 September 2010) <<http://www.adstandards.com.au/casereports/determinations>>.

⁴³ Advertising Standards Bureau, *Case Report 0407/10* (13 October 2010) <<http://www.adstandards.com.au/casereports/determinations>>.

⁴⁴ Advertising Standards Bureau, *Case Report 0136/11* (11 May 2011) <<http://www.adstandards.com.au/casereports/determinations>>. See also Advertising Standards Bureau, *Case Report 0409/10*, above n 42.

⁴⁵ Australian Food and Grocery Council, *Responsible Children's Marketing Initiative*, above n 2, app II.

specific exclusion that is intended to narrow the scope of application of the RCMI. As a result, the program content criterion captures only a small proportion of advertisements to which children are exposed.

In summary, most complaints fall outside of the RCMI because they are not placed in media that are directed primarily to children. From 2009 to 2012, the ASB dismissed 21 complaints under the RCMI. It dismissed over half (11) of these on the basis that the advertisement appeared in media directed to adults according to its creative content, or because it was watched by an audience of largely adult viewers.

Reducing the amount of unhealthy food advertising children see would require regulation with more comprehensive placement restrictions, including within media that attracts large numbers of children.⁴⁶ Time-based restrictions have been widely advocated by public health advocates, for example, watershed bans on advertising before 9pm or controls based on children's peak viewing times.⁴⁷ Yet, the food industry is unlikely to accept regulation that is based on absolute numbers of children watching, rather than the proportion of children in the audience.⁴⁸ This would significantly impair advertisers' ability to reach an adult audience, because regulation would apply to shows watched by large numbers of both children and adults.⁴⁹ For this reason, the AFGC is not willing to consider restrictions on advertising in evening viewing times.⁵⁰ The food industry also argues that children are being supervised by adults during this time, meaning that parents should take responsibility for monitoring what their children are watching.⁵¹ Consequently, regulation that seeks to significantly restrict the placement of unhealthy food advertising is likely to require government intervention.⁵²

⁴⁶ See MacKay et al, above n 29, 12; Lana Hebden, Lesley King and Bridget Kelly, 'Art of Persuasion: An Analysis of Techniques Used to Market Foods to Children' (2011) 47(11) *Journal of Paediatrics and Child Health* 776, 781.

⁴⁷ Hawkes, 'Self-Regulation Of Food Advertising: What It Can, Could And Cannot Do To Discourage Unhealthy Eating Habits Among Children', above n 1, 381; MacKay et al, above n 29, 33; Smithers, Lynch and Merlin, above n 31, 38; Elizabeth Handsley et al, 'Regulatory Axes on Food Advertising to Children on Television' (2009) 6(1) *Australia and New Zealand Health Policy* 1, 7; Sarah MacKay, 'Food Advertising and Obesity in Australia: To What Extent Can Self-Regulation Protect the Interests of Children?' (2009) 35 *Monash University Law Review* 118, 134.

⁴⁸ MacKay et al, above n 29, 27.

⁴⁹ Handsley et al, above n 47, 7-8.

⁵⁰ Tymms, above n 38, 51.

⁵¹ See Australian Food and Grocery Council, *Food and Beverage Advertising to Children: Activity Report* (2012) 5 <<http://www.afgc.org.au/industry-codes/advertising-to-children/rcmi/rcmi-reports-2009.html>>

⁵² Hawkes, 'Self-Regulation Of Food Advertising: What It Can, Could And Cannot Do To Discourage Unhealthy Eating Habits Among Children', above n 1, 381.

The QSRI

The QSRI defines ‘medium’ as ‘television, radio, newspapers, magazines, outdoor billboards and posters, emails, interactive games, cinema and internet sites’.⁵³ Unlike the RCMI’s definition of ‘media’, it does not make reference to the rating or audience share of television programs. On this basis the ASB has held that the program in which the advertisement is shown is not relevant to determining whether the advertisement is directed primarily to children.⁵⁴ In other words, to determine whether an advertisement is directed to children, the ASB will only consider the content of the advertisement and not whether it is placed in C and P programs or those with a large child audience. As a result, the QSRI has a narrower application than the RCMI, as it does not prohibit advertisements for unhealthy products that appeal to a general audience, but which are screened or published in media that large numbers of children see. Following the independent review of the QSRI, the quick service restaurant industry extended the initiative to advertisements placed in media that are directed primarily to children.⁵⁵ The revised version of the QSRI contains a section on ‘scope,’ which states that the initiative captures ‘Advertising and Marketing Communications to Children’ where:⁵⁶

- The medium is directed primarily to children (in relation to television this includes all C and P programs and G rated programs that are directed primarily to children); and/or
- The medium attracts an audience share of greater than 50 per cent of children.

In June 2013 the quick service restaurant industry agreed to reduce the audience share threshold from 50 per cent down to 35 per cent.⁵⁷ This will align the RCMI and QSRI, but it is unlikely that the revised definitions of media/medium will reduce children’s exposure to unhealthy food advertising (as discussed above).

⁵³ Australian Quick Service Restaurant Industry, above n 2, 4.

⁵⁴ See, e.g., Advertising Standards Bureau, *Case Report 084/11* (13 April 2011) <<http://www.adstandards.com.au/casereports/determinations>>.

⁵⁵ See Healthy Kids Association, *Final Report on the Compliance of Signatories to the Australian Quick Service Restaurant Industry Initiative for Responsible Advertising to Children* (2011) <<http://www.afgc.org.au/tools-guides-.html>>; Australian Food and Grocery Council, *Response: In Response To: Healthy Kids Association Incorporated - Final Report on the Compliance of Signatories to the Australian Quick Service Restaurant Industry Initiative for Responsible Advertising to Children* (9 January 2012) 5 <<http://www.afgc.org.au/tools-guides-.html>>.

⁵⁶ Australian Food and Grocery Council, *AFGC QSRI Initiative for Responsible Advertising and Marketing to Children*, above n 6, 1.

⁵⁷ See Australian Food and Grocery Council, *Position Statement in Response to Responsible Advertising to Children: An Independent Review of the Australian Food and Beverage Industry Self-Regulatory Codes*, above n 6, 8.

The ABAC

Unlike the RCMi and QSRI, the ABAC does not contain a definition of media. Accordingly, it applies to the content of alcohol advertising in all media. However, the ABAC does not restrict the *placement* of advertisements.⁵⁸ This means that the ABAC Adjudication Panel cannot make judgments on whether it is appropriate for an alcohol advertisement to be placed in a particular medium. The Panel has dismissed complaints concerning the placement of advertisements in train stations,⁵⁹ on billboards in shopping centres,⁶⁰ and on vehicles.⁶¹ The issue in these complaints is not that the content of the advertisement appeals to children, but that its location means that large numbers of children will see it. For example, one complaint involved an advertisement for Lion Australia's XXXX Summer Lager located on a website that targeted young children (yepi.com).⁶² The Panel noted that the complaint raised a 'very legitimate concern about the presence of an alcohol advertisement on a children's website',⁶³ but the advertisement's placement on the website did not offend the terms of the ABAC *per se*. As the content of the advertisement did not have strong or evident appeal to children, it did not breach any of the standards contained in the ABAC and the Panel was obliged to dismiss the complaint.⁶⁴

The ABAC's lack of placement restrictions means that it has little impact on young people's exposure to alcohol advertising. Yet research shows high levels of exposure to televised alcohol advertising among Australian young people.⁶⁵ As with food advertising, systematic reviews of research suggest that exposure to alcohol advertising is associated with the likelihood that adolescents will start drinking alcohol, or that those already drinking will increase their intake.⁶⁶ Further, studies show that advertising affects young people's beliefs and intentions to drink alcohol and their actual drinking behaviours, regardless of the target

⁵⁸ See Simone Pettigrew, Rebecca Johnson and Mike Daube, 'Introducing and Applying a New Australian Alcohol Advertising Code' (2012) 13(1) *Journal of Public Affairs* 72.

⁵⁹ ABAC Complaints Panel, *Determination No: 78/10* (17 December 2010) <<http://www.abac.org.au/adjudication/78-10/>>.

⁶⁰ ABAC Complaints Panel, *Determination No: 76/10* (17 December 2010) <<http://www.abac.org.au/adjudication/76-10/>>.

⁶¹ ABAC Complaints Panel, *Determination No: 108/09* (2 December 2009) <<http://www.abac.org.au/adjudication/108-09/>>.

⁶² ABAC Complaints Panel, *Determination No: 6/12* (18 January 2012) <<http://www.abac.org.au/adjudication/6-12/>>.

⁶³ *Ibid* 4.

⁶⁴ *Ibid*.

⁶⁵ Lynda Fielder, Robert Donovan and Robyn Ouschan, 'Exposure of Children and Adolescents to Alcohol Advertising on Australian Metropolitan Free-to-Air Television' (2009) 104(7) *Addiction* 1157.

⁶⁶ Peter Andersen et al, 'Impact of Alcohol Advertising and Media Exposure on Adolescent Alcohol Use: A Systematic Review of Longitudinal Studies' (2009) 44(3) *Alcohol and Alcoholism* 229.

audience.⁶⁷ Accordingly, the ABAC does not address one of the key mechanisms through which alcohol advertising influences young people's alcohol consumption patterns, i.e. their exposure to a large volume of alcohol marketing, as opposed to advertising messages that directly target them. The failure to limit children and adolescents' exposure to unhealthy or inappropriate advertising is a similarity that the ABAC shares with the RCMI and QSRI.

3. Advertising directed primarily to children

Food advertising codes

When the ASB concludes that an advertisement is not placed in a medium that is directed to children, it then will consider whether the creative content of the advertisement itself is directed to children. This approach is based on the codes' definition of 'advertising to children'. In the RCMI this is:⁶⁸

... advertising or marketing communications, which, having regard to the theme, visuals and language used, are directed primarily to Children and are for Product.

The QSRI contains much the same definition:⁶⁹

Advertising or Marketing Communications to Children means 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.

The ASB determines whether an advertisement directly targets children according to the overall impact of its visuals, language and themes, as well as the advertiser's intended target audience.⁷⁰ However, this approach lends itself to a very narrow and literal interpretation of the phrase 'directed primarily to children',⁷¹ as is evident from the ASB's determinations. For

⁶⁷ Petra Meier et al, 'Independent Review of the Effects of Alcohol Pricing and Promotion' (School of Health and Related Research, University of Sheffield, 2008) 91 <http://www.shef.ac.uk/polopoly_fs/1.95617!/file/PartA.pdf>. See also Andersen et al, above n 66; Gerard Hastings et al, 'Alcohol Marketing and Young People's Drinking: A Review of the Research' (2005) 26(3) *Journal of Public Health Policy* 296.

⁶⁸ Australian Food and Grocery Council, *Responsible Children's Marketing Initiative*, above n 2, 1. The definition of 'Product' is based on that contained in the AANA's Code for Advertising and Marketing Communications to Children ('goods, services and/or facilities which are targeted toward and have principal appeal to Children'), but is confined to food and beverage products. See Chapter 2 of this thesis.

⁶⁹ Australian Quick Service Restaurant Industry, above n 2, 3. See also Australian Food and Grocery Council, *AFGC QSRI Initiative for Responsible Advertising and Marketing to Children*, above n 6, 3.

⁷⁰ See Advertising Standards Bureau, *Case Report 0429/10* (27 October 2010) 5 <<http://www.adstandards.com.au/casereports/determinations>>. Australian Communications and Media Authority, 'Industry Self-Regulation of Children's Food and Beverage Advertising: ACMA Monitoring Report' (Australian Government, 2011) 15 <<http://engage.acma.gov.au/kids-food-ads/>>.

⁷¹ *Ibid* 19.

example, the ASB considered an advertisement for Allen's Snakes confectionery (owned by Nestlé), which showed children and adults in a street setting and a giant doll blowing bubbles over the crowd.⁷² Some of the bubbles changed into lollies, and the advertisement featured a scene of a child eating one. The nursery song 'This Old Man' played in the background. The complaint alleged that the advertisement breached the RCMI because it advertised a product that was not a 'healthy dietary choice' and that it contained elements that would appeal to children. These included visual images of a doll and bubbles, as well as children catching and eating lollies; the use of a children's song; and the themes of fantasy and imagination.⁷³

The ASB acknowledged that the advertised product was not a 'healthy dietary choice'.⁷⁴ To decide whether the advertisement was directed to children, the ASB first considered the media that the advertisement appeared in, which included television programs such as *Home and Away*.⁷⁵ While popular with children, these programs did not have an audience of 50 per cent or more children and so were not 'directed primarily to children'. The ASB then considered the advertisement's content. It noted that the advertiser's intent was to 'create a nostalgic scene which would remind adults of their childhoods', as evidenced by the choice of an old-fashioned nursery rhyme and the images of a doll (rather than a more contemporary child's toy).⁷⁶ The ASB said that the advertisement 'would be of considerable attraction to children', but its overall impact meant that it was not 'specifically directed or designed to be clearly directly primarily appealing to children'.⁷⁷

By focusing on the advertisement's impact on adults, the ASB's decision allows advertisers to circumvent the RCMI and QSRI by designing advertising that appeals to adults or families as well as to children.⁷⁸ Further, this illustration of how the ASB interprets the standards contained in the RCMI suggests an industry going to extreme lengths to protect itself from the application of its own weak standards. Even if this is not an example of a cynical exercise in giving the pretence of regulation, it nevertheless undermines the credibility of the food industry's scheme.

⁷² Advertising Standards Bureau, *Case Report 0429/10*, above n 70.

⁷³ *Ibid* 1-2.

⁷⁴ *Ibid* 5.

⁷⁵ *Ibid* 6.

⁷⁶ *Ibid*.

⁷⁷ *Ibid*.

⁷⁸ Hebden, King and Kelly, above n 46, 780.

The ABAC

Similar to the food codes, the ABAC prohibits advertising that has ‘strong or evident appeal to children and adolescents’. The code does not define this phrase, nor does it identify advertising content that may be appealing to children.⁷⁹ From its prior determinations the ABAC Panel has established criteria for assessing whether an advertisement has strong and evident appeal to children:⁸⁰

- (a) The advertiser’s intention as to the target audience is not material; it is the ‘probable’ impact of the advertisement on a reasonable person that is important;
- (b) An advertisement can have consequential or residual appeal to children or adolescents and not breach the ABAC; and
- (c) Assessment of an advertisement’s appeal to children is undertaken on a case-by-case basis, making reference to imagery, colour, use of characters and context to decide the overall impact of the advertisement.

The Panel’s approach is stronger than that of the ASB, given that it uses a reasonable person standard rather than considering the advertiser’s intended audience. However, as with food advertising codes, the requirement that advertising have ‘strong or evident’ appeal to children means that advertising content must be targeted to children to be covered by the ABAC. This permits advertisers to use creative content that appeals to children so long as the overall design of the advertisement addresses adults. For example, research shows that the use of animal characters in alcohol advertising enhances its appeal with young people and influences their intention to purchase the advertised product or brand.⁸¹ Several complaints to the ABAC Adjudication Panel concern the ‘Bundy R Bear’ character that Diageo uses to market Bundaberg Rum. According to the ABAC Adjudication Panel, this character can appeal to children given its resemblance to other characters that are popular with children.⁸² However, whether advertisements featuring Bundy Bear move from incidental to strong

⁷⁹ Section (b) contains some specific restrictions on the portrayal of children and adolescents in alcohol advertising (listed above). See The ABAC Scheme Limited, *Alcohol Beverages Advertising (and Packaging) Code*, above n 3, pt 1 (b)(i)-(iii).

⁸⁰ ABAC Complaints Panel, *Determination No: 73/12A* (26 November 2012) 8-9 <<http://www.abac.org.au/adjudication/73-12/>>.

⁸¹ See Meng-Jinn Chen, ‘Alcohol Advertising: What Makes It Attractive To Youth?’ (2005) 10(6) *Journal of Health Communication* 553; Robert J Donovan, Lynda Fielder and Geoffrey Jalleh, ‘Alcohol Advertising Advocacy Research No Match for Corporate Dollars: The Case of Bundy R Bear’ (2011) 20 *Journal of Research for Consumers* 1; Simone Pettigrew et al, ‘The Extent and Nature of Alcohol Advertising on Australian Television’ (2012) 31(6) *Drug and Alcohol Review* 797.

⁸² ABAC Complaints Panel, *Determination No: 11/06* (25 April 2006) <<http://www.abac.org.au/adjudication/11-06/>>.

appeal depends upon the context within which the character is used,⁸³ and the overall impact of the advertisement on children.⁸⁴

In one determination the Panel ruled that an advertisement featuring Bundy Bear strongly appealed to children as it featured a party theme, visuals of balloons and party-goers wearing cowboy hats.⁸⁵ In that instance, the Panel's ruling went against the alcohol industry. However, another determination concerned a website for Bundaberg rum, which showed Bundy Bear in a western style gunfight.⁸⁶ In contrast to previous campaigns, it used a computer generated bear that looked more masculine and human-like. The complaint said that the Western theme and the computer-generated nature of the character would appeal to children, particularly given similarities between the advertisement and a computer game that was popular with youth. Further, survey data showed that a majority of children identified the character with Bundaberg Rum and that they associated the bear with positive attributes.⁸⁷ The Panel's determination noted that Diageo had altered the Bear's appearance so that it more closely resembled a human rather than a popular children's character. Further, a computer-generated character could not be assumed to be particularly appealing to children. Considering that the movie western genre was also widely popular, the advertisement as a whole could not be said to have 'strong or evident appeal to children'.⁸⁸

Both the ASB and the ABAC Adjudication Panel consider advertising features that appeal to children within the context of the advertisement as a whole. This approach is problematic as advertisements that are aimed at adults may be equally or more appealing to children.⁸⁹ The messages in alcohol advertising may be directed to young adults, but inevitably they reach older teenagers and may also be attractive to children.⁹⁰ Similarly, food advertisers increasingly address parents in order to promote children's foods.⁹¹ These promotions often feature imagery that depicts children as happy and enjoying foods offered to them by parents.

⁸³ Ibid 6.

⁸⁴ ABAC Complaints Panel, *Determination No: 37/10* (14 October 2010) 10 <<http://www.abac.org.au/adjudication/37-10/>>.

⁸⁵ ABAC Complaints Panel, *Determination No: 11/06*, above n 82.

⁸⁶ ABAC Complaints Panel, *Determination No: 37/10*, above n 84.

⁸⁷ Ibid 3. See also Donovan, Fielder and Jalleh, above n 81.

⁸⁸ Ibid.

⁸⁹ World Health Organisation, 'A Framework for Implementing the Set of Recommendations on the Marketing of Foods and Non-Alcoholic Beverages to Children', above n 28, 26.

⁹⁰ Richard J Bonnie and Ellen O'Connell (eds), *Reducing Underage Drinking: A Collective Responsibility* (The National Academies Press, 2004) 133.

⁹¹ Hebden, King and Kelly, above n 46; Jeremy Lee, 'Food Advertising Shifts Focus from Kids to Parents', *Marketing* (online) 8 July 2008 <<http://www.marketingmagazine.co.uk/article/829678/food-advertising-shifts-focus-kids-parents>>.

Such themes appeal to children and can affect their attitude towards the advertised product.⁹² They suggest to parents that children will be happier and healthier consuming these foods, which may influence what foods parents give to their children.⁹³ Additionally, this creative content blurs the boundaries between parent and child-targeted food advertising, making it more difficult to regulate. Such problems are compounded by the narrow interpretative approach taken by the ABAC Adjudication Panel and the ASB.

4. Media channels and marketing techniques

Food advertising codes

The scope of the RCMI and QSRI is based on the term ‘media’.⁹⁴ However, both codes exclude a range of communication channels from their definitions of this term, as illustrated in Table 12 below. The RCMI exempts novel forms of marketing, such as text messages, emails and viral marketing, as well as product packaging and labelling and point-of-sale material.⁹⁵ The QSRI excludes point-of-sale advertising and packaging, which fast-food restaurants frequently use in marketing to children.⁹⁶ The codes also contain inconsistent definitions of the term, with the QSRI covering a wider range of media than the RCMI.

The exclusion of company-owned websites is a particularly significant loophole in the RCMI. The ASB has dismissed six complaints on the basis that they concern advertisements appearing on company websites or micro-sites produced by RCMI signatories. One complaint involved a website for the Nestlé confectionery product ‘Smarties’ (smarties-australia.com.au).⁹⁷ The complainant argued that the website was directed primarily to children and advertised a product that was high in sugar and saturated fat.⁹⁸ However, the RCMI did not apply to the website as it was owned by Nestlé. On this basis, the ASB

⁹² See, e.g., Harris, Brownell and Bargh, above n 27, 231.

⁹³ Hebden, King and Kelly, above n 46, 780; Sonya A Grier et al, 'Fast-Food Marketing and Children's Fast-Food Consumption: Exploring Parents' Influences in an Ethnically Diverse Sample' (2007) 26(2) *Journal of Public Policy and Marketing* 221.

⁹⁴ See p p. 172-174 of this chapter for the codes' definition of this term.

⁹⁵ J Lumley, J Martin and N Antonopoulos, 'Exposing the Charade: The Failure to Protect Children from Unhealthy Food Advertising' (Obesity Policy Coalition, 2012) 14
<<http://www.opc.org.au/paper.aspx?ID=exposing-the-charade&Type=policydocuments>>.

⁹⁶ Hawkes and Harris, above n 23, 1410. See also Lana Hebden et al, 'A Menagerie of Promotional Characters: Promoting Food to Children through Food Packaging' (2011) 43(5) *Journal of Nutrition Education and Behaviour* 349.

⁹⁷ See Advertising Standards Bureau, *Case Report 0414/10* (13 September 2010)

<<http://www.adstandards.com.au/casereports/determinations>>.

⁹⁸ *Ibid* 3-4.

dismissed the complaint without considering the substantive content of the site or whether the advertised product was a ‘healthier choice’.⁹⁹

Table 12. Communication channels covered by the RCMI and QSRI

Code	RCMI	QSRI
Included media	Television, radio, print, cinema, third-party internet sites.	Television, radio, newspapers, magazines, outdoor advertising, emails, interactive games, cinema, internet sites.
Excluded media	Outdoor and billboard advertising, packaging, point-of-sale, email, text messages, word-of-mouth marketing, company-owned websites.	Point-of-sale, packaging, labels.

Although food companies spend the most money on television advertising, evidence suggests that they are increasing their budget in new media. For example, in 2009 US food companies spent \$122.5 million on advertising to children through company and other websites, digital media, word-of-mouth and viral marketing.¹⁰⁰ This represented a 50.5 per cent increase from expenditure in these media in 2006.¹⁰¹ Given that the Australian initiatives exempt many of these communication channels, companies may shift their advertising spend to new media in order to circumvent the codes, and also because these media are increasingly significant in children’s lives.¹⁰² This was the tobacco industry’s response to advertising restrictions that applied only to radio and television advertising.¹⁰³ One study of tobacco advertising bans in 77 developed countries found that limited advertising restrictions had little or no effect on tobacco consumption.¹⁰⁴ This was because tobacco companies simply moved their advertising to non-banned forms of media. In contrast, more comprehensive bans did affect tobacco

⁹⁹ When considering whether the advertisement was directed to children for the purposes of the AANA *Food and Beverages Advertising and Marketing Communications Code*, the ASB concluded that the visuals, theme and language used on the website created an overall impression that it was not directed primarily to children, although it would be attractive to children. According to the ASB, this was because information on entering the competition was directed to adults, even though the competition was only open to children (ibid 5).

¹⁰⁰ Jon Leibowitz et al, 'A Review of Food Marketing to Children and Adolescents: Follow-up Report' (Federal Trade Commission, December 2012) 6 <<http://www.ftc.gov/opa/2012/12/foodmarketing.shtm>>.

¹⁰¹ Ibid. See also Mary Story and Simone French, 'Food Advertising and Marketing Directed at Children and Adolescents in the US' (2004) 1(1) *International Journal of Behavioural Nutrition and Physical Activity* 3, 12-13; Susan E Linn, 'Food Marketing to Children in the Context of a Marketing Maelstrom ' (2009) 25(3/4) *Journal of Public Health Policy* 367, 370.

¹⁰² MacKay et al, above n 29, 28.

¹⁰³ Henry Saffer and Frank Chaloupka, 'The Effect of Tobacco Advertising Bans on Tobacco Consumption' (2000) 19(6) *Journal of Health Economics* 1117, cited in MacKay et al, above n 29, 28.

¹⁰⁴ Ibid 1134.

consumption, suggesting that the efficacy of advertising restrictions can be undermined by restricting only a sub-set of communication channels.¹⁰⁵

Persuasive techniques

As summarised in Table 13, the RCMI and QSRI place restrictions on the use of certain promotional techniques that children are particularly vulnerable to.

Table 13. Controls on persuasive techniques in the RCMI and QSRI

Code	Popular personalities	Product placement	Interactive games	Advertising in schools	Premium offers
RMI	Popular personalities/ program characters/ licensed characters must not be used in advertising unless it is for healthy dietary choices/references healthy lifestyle messages (as per core principle).	Not to be used in any medium directed primarily to children unless products are healthy dietary choices.	Interactive games must use healthy dietary choice products/reference healthy lifestyle messaging (per core principle).	Must be requested by school for educational/ informational purposes, or related to healthy lifestyle activities.	Not to be used unless the reference to the premium is 'merely incidental' to advertised product.
QSRI	Popular personalities/licensed characters are not to be used in advertising unless it is for healthy dietary choices/references healthy lifestyle messages (as per core principle).	Not to be used in any medium directed primarily to children unless products are healthy dietary choices.	Interactive games using signatories' products must reference healthy lifestyle.	Must be requested by school for educational/ Informational purposes or related to healthy lifestyle activities.	Not to be used in media directed primarily to children unless reference is 'merely incidental' to advertised product.

The codes exclude a number of persuasive techniques used to promote unhealthy food to children. The RCMI and QSRI's definition of 'popular personalities and licensed characters' permits the use of 'equity brand' or proprietary characters developed and owned by food advertisers, for example Cadbury's 'Freddo Frog' and Kellogg's 'Coco the Monkey'.¹⁰⁶ This is in contrast to the CTS 2009, which restrict the use of proprietary characters to endorse products during designated children's viewing periods.¹⁰⁷ The initiatives also exclude sports sponsorship, fundraising in schools, and brand advertising. The latter is excluded because the

¹⁰⁵ Ibid.

¹⁰⁶ See National Heart Forum, *An Analysis of the Regulatory and Voluntary Landscape Concerning the Marketing and Promotion of Food and Drink to Children* (2011) 42-43 <<http://www.heartforum.co.uk/our-work/policy/nutrition/marketing-food-and-drink-to-children/>>. See also Hawkes and Harris, above n 23, 1408.

¹⁰⁷ Australian Communications and Media Authority, *Children's Television Standards 2009* (at 11 July 2013) CTS 35(1).

codes' definition of advertising requires promotions to be for 'product', i.e. foods and beverages.¹⁰⁸ On this basis, the ASB interprets the initiatives as applying only to advertising that promotes specific food and beverages, not to promotions for companies themselves, their brands or outlets.¹⁰⁹

For example, one complaint to the ASB concerned McDonald's Happy Meal website (HappyMeal.com.au).¹¹⁰ The website did not make direct reference to Happy Meal products. Rather, it featured the Happy Meal logo, images of characters from a popular children's movie, games and activities for children and information about children's parties at McDonald's. The ASB held that the site did not fall within the scope of the QSRI because it did not meet the code's definition of an advertisement, which is:¹¹¹

... any matter generated by a participant which is published or broadcast using any medium for payment or other valuable consideration and which draws the attention of the public, or a segment of it, to a product... in a manner calculated to promote...directly or indirectly that product...

According to the ASB, the website did not draw the attention of children to Happy Meals in a manner calculated to promote the product,¹¹² as the website contained only 'one substantive reference to McDonald's or Happy Meals in the form of the Happy Meal logo'.¹¹³ However, this is in contrast to the position of the Australian Communications and Media Authority (ACMA), which investigated a program that featured promotional material for McDonalds, although no actual products or services were endorsed.¹¹⁴ The ACMA held that under the Free TV Code brand promotion could constitute the promotion of products and services. According to the AMCA, references to McDonald's characters, the 'Golden Arches' and advertising slogan 'I'm lovin' it' increases recognition of the brand and brand awareness,

¹⁰⁸ Australian Food and Grocery Council, *Responsible Children's Marketing Initiative*, above n 2, 1, 4; Australian Quick Service Restaurant Industry, above n 2, 3.

¹⁰⁹ See Handsley et al, above n 47, 3; Lumley, Martin and Antonopoulos, above n 95, 12-13; Hebden et al, 'Advertising of Fast-Food to Children on Australian Television: The Impact of Industry Self-Regulation', above n 35, 23.

¹¹⁰ Advertising Standards Bureau, *Case Report 0103/11* (13 April 2011) <<http://www.adstandards.com.au/casereports/determinations>>.

¹¹¹ Australian Quick Service Restaurant Industry, above n 2, 3.

¹¹² Advertising Standards Bureau, *Case Report 0103/11*, above n 110, 8.

¹¹³ *Ibid.* See also Advertising Standards Bureau, *Case Report 0221/12* (13 July 2012) <<http://www.adstandards.com.au/casereports/determinations>> where the ASB held that a similar website did constitute an advertisement as it included a number of pictures of Happy Meals themselves as well as prominent images of the product logo.

¹¹⁴ Australian Communications and Media Authority, *Investigation Report No 2782* (1 June 2012) <<http://www.acma.gov.au/theACMA/acma-i/Investigation-reports/Television-investigations/television-operationsvic-commercial-tv-investigations>>, cited in Lumley Martin and Antonopoulos, above n 95, 15-16.

which enhances consumers' ability to link the brand name, logo and characters to the products and services sold by McDonald's.¹¹⁵

The ACMA's decision recognises that brand advertising is highly influential on children. Brand promotion aims to create a set of positive associations between the brand, product attributes and values that encourage sales.¹¹⁶ Food marketers expend considerable resources in communicating their brand images to children, including through product placement, packaging, signage at point-of-sales, celebrity endorsements and promotional tie-ins.¹¹⁷ As a result, children can recognise specific brands from as early as two years of age. Between two and six years of age they can recognise familiar brand names, packaging, logos and characters, and associate them with particular products.¹¹⁸ Brand advertising aims to create life-long customers, rather than stimulating immediate sales.¹¹⁹ It can also influence taste perceptions: in one study, children preferred the taste of food that they thought was from McDonald's compared to identical unbranded products.¹²⁰ However, the effect of the ASB's interpretive approach is that the codes regulate advertising that directly promotes food and beverage products, but not advertising that uses creative and emotional techniques to build brand (and category) power with children.¹²¹

The ASB's determinations limit coverage of persuasive techniques that are included in the codes' terms. One example is its approach to the initiatives' provisions on premium offers. The RCMI and QSRI define a premium as 'anything offered free or at a reduced price and which is conditional upon the purchase of a children's food or beverage product'.¹²² The initiatives permit the use of premium offers so long as the reference to the premium is 'merely incidental' to the product being advertised.¹²³ Premiums encourage children to

¹¹⁵ Ibid 4-5.

¹¹⁶ See Harris, Brownell and Bargh, above n 27, 229.

¹¹⁷ Ibid.

¹¹⁸ Paul M Fischer et al, 'Brand Logo Recognition by Children Aged 3 to 6 Years' (1991) 266(22) *Journal of the American Medical Association* 3145; Cynthia Fraser Hite and Robert E Hite, 'Reliance on Brand by Young Children' (1995) 37 (2) *Journal of the Market Research Society* 185; Thomas N Robinson et al, 'Effects of Fast-Food Branding on Young Children's Taste Preferences' (2007) 161(8) *Archives of Paediatrics and Adolescent Medicine* 792.

¹¹⁹ Susan M Connor, 'Food-Related Advertising on Preschool Television: Building Brand Recognition in Young Viewers' (2006) 118(4) *Paediatrics* 1478, 1483.

¹²⁰ Robinson et al, above n 118. See also Samuel McClure et al, 'Neural Correlates of Behavioural Preference for Culturally Familiar Drinks' (2004) 44(2) *Neuron* 379.

¹²¹ See also Hawkes, 'Self-Regulation Of Food Advertising: What It Can, Could And Cannot Do To Discourage Unhealthy Eating Habits Among Children', above n 1, 380.

¹²² Australian Food and Grocery Council, *Responsible Children's Marketing Initiative*, above n 2, 4; Australian Quick Service Restaurant Industry, above n 2, 4.

¹²³ Australian Food and Grocery Council, *Responsible Children's Marketing Initiative*, above n 2, 2; Australian Quick Service Restaurant Industry, above n 2, 4.6.

purchase companies' products and enhance brand reputation.¹²⁴ Critics also argue that premiums are designed to increase 'pester power', i.e. they influence children to ask their parents to purchase the meal due to their desire to obtain the premium, rather than the product itself.¹²⁵ Australian research shows high rates of food advertising using premium offers during children's peak television viewing periods. This advertising largely promotes unhealthy products, including chocolate and other confectionery, fast-food restaurant meals and sugary breakfast cereals.¹²⁶

The ASB has held that the toys contained in McDonald's Happy Meals and in Hungry Jack's Kid's Club Meals are not premium offers,¹²⁷ nor are the toys contained in Kinder Surprises.¹²⁸ In contrast, the ACMA has determined that the toys in McDonald's Happy Meals constitute a premium offer for the purposes of the CTS 2009.¹²⁹ According to the ACMA, the inclusion of the toy is intended to induce the purchase of the product by children, having regard to the nature of the advertisement, the target consumer of the product (children), and the appeal of a toy to this audience.¹³⁰ Public health advocates asked the ASB to reconsider its position on premium offers in light of the ACMA's views.¹³¹ However, the ASB refused to do so,¹³² despite research showing high levels of public support for restrictions on the use of toys and giveaways by food companies.¹³³ Thus, the ASB's interpretation is out of step with the views of the community, as well as those of the government broadcasting regulator.¹³⁴ Its approach renders the premium offer provisions of the codes virtually meaningless, as companies can

¹²⁴ Story and French, above n 101, 11-12.

¹²⁵ See, e.g., Heather Morton et al, 'Food Advertising and Broadcasting Legislation – A Case of System Failure?' (2005) 62(1) *Nutrition & Dietetics* 26; Georgina Cairns, Kathryn Angus and Gerard Hastings, 'The Extent, Nature and Effects of Food Promotion to Children: A Review of the Evidence to December 2008' (World Health Organisation, 2009) 17

<http://www.who.int/dietphysicalactivity/publications/marketing_evidence_2009/en/index.html>. See also Advertising Standards Bureau, *Case Report 573/09* (9 December 2009)

<<http://www.adstandards.com.au/casereports/determinations>>.

¹²⁶ Bridget Kelly et al, 'Persuasive Food Marketing to Children: Use of Cartoons and Competitions in Australian Commercial Television Advertisements' (2008) 23(4) *Health Promotion International* 337, 343.

¹²⁷ See Advertising Standards Bureau, *Case Report 573/09*, above n 125; Advertising Standards Bureau, *Case Report 572/09* (9 December 2009) <<http://www.adstandards.com.au/casereports/determinations>>.

¹²⁸ Advertising Standards Bureau, *Case Report 0443/10* (10 November 2010)

<<http://www.adstandards.com.au/casereports/determinations>>; Advertising Standards Bureau, *Case Report 75/10* (10 March 2010) <<http://www.adstandards.com.au/casereports/determinations>>.

¹²⁹ Australian Communications and Media Authority, *Investigation Report 2364, 2372, 2389, 2390, 2391* (9 December 2010) <http://www.acma.gov.au/WEB/STANDARD/pc=PC_310282>.

¹³⁰ *Ibid* 6-7.

¹³¹ See for example Advertising Standards Bureau, *Case Report 0103/11*, above n 110.

¹³² *Ibid* 89.

¹³³ See Belinda Morley et al, 'Public Opinion on Food-Related Obesity Prevention Policy Initiatives' (2012) 23(2) *Health Promotion Journal of Australia* 86.

¹³⁴ Lumley Martin and Antonopoulos, above n 95, 17.

advertise free toys so long as they comprise a single package along with the food product being offered.¹³⁵

Extending the initiatives' coverage of communication channels and persuasive techniques

As interpreted by the ASB, the initiatives allow companies to use a wide range of communication channels and promotional techniques to advertise unhealthy products to children. However, the food industry recently took action to close off some of the codes' loopholes. The independent review in 2012 found that the different definitions of media in the RCMI and QSRI created ambiguity and confusion, and left the self-regulatory scheme open to criticism.¹³⁶ In response, the AFGC said it would extend the initiatives to include marketing and advertising on all internet sites, including company-owned and brand websites.¹³⁷ Following a separate review of the QSRI, the quick service restaurant industry also agreed to extend its initiative to children's sport promotions. From 2013, signatories could only give away food and beverage products (or vouchers as prizes or awards) if these products were 'healthy dietary choices'.¹³⁸

These changes still leave some forms of media and promotional techniques outside the scope of the RCMI and QSRI, including product packaging, outdoor media and sponsorship (in the case of the RCMI) and direct or viral marketing to children.¹³⁹ Yet food companies increasingly use integrated marketing campaigns that combine a wide range of media and multiple persuasive techniques.¹⁴⁰ One US study of 77 food advertisers' websites found that 73 per cent of these sites posted at least one game, with one site containing 67 games.¹⁴¹ These websites also incorporated viral marketing, sales promotions, branded 'extras' and

¹³⁵ Handsley et al, above n 47, 8; Lana Hebden et al, 'Industry Self-regulation of Food Marketing to Children: Reading the Fine Print' (2010) 21(3) *Health Promotion Journal of Australia* 229, 233.

¹³⁶ Tymms, above n 38, 43.

¹³⁷ Australian Food and Grocery Council, *Position Statement in Response to Responsible Advertising to Children: An Independent Review of the Australian Food and Beverage Industry Self-Regulatory Codes*, above n 6, 8.

¹³⁸ Australian Food and Grocery Council, *In Response To: Healthy Kids Association Incorporated - Final Report on the Compliance of Signatories to the Australian Quick Service Restaurant Industry Initiative for Responsible Advertising to Children*, above n 55, 5.

¹³⁹ Lumley, Martin and N Antonopoulos, above n 95, 13-14.

¹⁴⁰ See, e.g., Cairns, Angus and Hastings, above n 125, 2; Bridget Kelly et al, 'Internet Food Marketing on Popular Children's Websites and Food Product Websites in Australia' (2008) 11(11) *Public Health Nutrition* 1180; Sandra C Jones and Amanda Reid, 'Marketing to Children and Teens on Australian Food Company Web Sites' (2010) 11(1) *Young Consumers* 57; Jennifer L Harris et al, 'US Food Company Branded Advergaming on the Internet: Children's Exposure and Effects on Snack Consumption' (2011) 6(1) *Journal of Children and Media* 51.

¹⁴¹ Elizabeth Moore and Victoria J Rideout, 'The Online Marketing of Food to Children: Is it Just Fun and Games?' (2007) 26(2) *Journal of Public Policy and Marketing* 202, 207-208.

embedded television commercials.¹⁴² Because of the initiatives' limited terms, the ASB cannot consider the overall effects of a campaign that uses multiple forms of media and different promotional techniques. The effects of integrated marketing may be more profound, but also more insidious than those of single instance advertisements in building brand awareness and long-term dietary preferences and habits.¹⁴³ This is particularly the case given that food advertisers increasingly use digital forms of marketing that more directly target children, and blur the boundaries between commercial messaging and other forms of content.¹⁴⁴

Media channels and promotional techniques covered by the ABAC

The ABAC does not contain a definition of 'media,' nor does it define the meaning of 'alcohol advertisement'. This allows the ABAC Adjudication Panel to draw new forms of media and marketing techniques into the scope of the code. For example, it has held that a Facebook page can be an alcohol advertisement for the purposes of the ABAC.¹⁴⁵ 'Surrogate marketing' is also covered by the code, defined as 'the indirect promotion of a product through the marketing of an associated product'.¹⁴⁶ Conversely, the Panel recently decided that product placement did not constitute an advertisement under the ABAC,¹⁴⁷ when considering a music video that featured images of Midori, a melon-flavoured liqueur. According to the Panel, the ABAC distinguished between advertising and other forms of promotion, including product placement of alcohol products in media.¹⁴⁸ Although the Panel has significant discretion to widen the code's ambit, this creates uncertainty for the public and industry members about the codes' application to different communication channels and

¹⁴² Ibid 207-211.

¹⁴³ Montgomery and Chester, above n 26; National Heart Forum, above n 106, 42.

¹⁴⁴ Ibid.

¹⁴⁵ ABAC Complaints Panel, *Determination No: 38/09* (11 May 2009) <<http://www.abac.org.au/adjudication/38-09/>>.

¹⁴⁶ Management Committee of the ABAC Scheme, *The ABAC Scheme Annual Report 2009* (2009) 7 The ABAC Scheme <<http://www.abac.org.au/publications/annual-reports/>>; ABAC Complaints Panel, *Determination No: 7/09* (3 March 2009) 13 <<http://www.abac.org.au/adjudication/7-09/>>.

¹⁴⁷ ABAC Complaints Panel, *Determination No: 85/11* (8 November 2011) <<http://www.abac.org.au/adjudication/85-11/>>. The Panel defined product placement as 'a commercial relationship between the owner or promoter of a particular product brand and the use of that product and/or brand within the content of a broadcast or published work developed by a third party' (ibid 6). See also Pola B Gupta and Kenneth R Lord, 'Product Placement in Movies: The Effect of Prominence and Mode on Audience Recall' (1998) 20(1) *Journal of Current Issues and Research in Advertising* 47; National Committee for the Review of Alcohol Advertising, 'Review of the Self-Regulatory System for Alcohol Advertising. Report to the Ministerial Council of Drug Strategy' (Minister for Health Victoria, 2003) 55-56 <[http://docs.health.vic.gov.au/docs/doc/2E4E141E5A719092CA2578A1000A1CB0/\\$FILE/ncaareport.pdf](http://docs.health.vic.gov.au/docs/doc/2E4E141E5A719092CA2578A1000A1CB0/$FILE/ncaareport.pdf)>.

¹⁴⁸ ABAC Complaints Panel, *Determination No: 85/11*, above n 147, 8-9.

marketing techniques. It also has the potential to create gaps in the ABAC's coverage where the Panel decides that forms of promotion fall outside the code.

The terms of the ABAC have been extended to include packaging and labelling, retail advertising and promotions at events.¹⁴⁹ However, the ABAC Scheme still excludes some forms of promotion, most notably sports sponsorship.¹⁵⁰ Thus, the ABAC Adjudication Panel cannot rule on complaints about sponsorship, although it can examine advertisements that are incorporated in, or flow from, sponsorship deals.¹⁵¹ However, the Panel can only undertake 'an incomplete and narrow scrutiny of sponsorship, via the occasional intersection of the arrangements with the ABAC Scheme where an "alcohol beverage advertisement"... is produced'.¹⁵² An additional concern is that the code is based on the idea of marketing as a single advertisement published in relatively static media, such as print, television or radio.¹⁵³ As with food advertising, contemporary alcohol marketing increasingly involves 'packages of promotions' that draw upon inter-related marketing activities across a range of media.¹⁵⁴ Thus, the ABAC Scheme sits uneasily with promotional strategies that combine multiple forms of marketing and advertising.¹⁵⁵ Like the ASB, the Panel has difficulties assessing campaigns involving an overall theme and incorporating a range of different media and marketing techniques.¹⁵⁶

Sports sponsorship and food and alcohol advertising codes

Food and alcohol advertising codes contain critical loopholes around sponsorship. It seems likely that the ABAC excludes sponsorship because '[t]he nexus between sport and alcohol is a long-standing and accepted one and is buttressed by alcohol sponsorship of both professional and amateur sport'.¹⁵⁷ A similar relationship exists between food companies and

¹⁴⁹ See The ABAC Scheme Limited, Alcohol Beverages Advertising (and Packaging) Code, above n 3, 3-5.

¹⁵⁰ The ABAC does not explicitly exclude sponsorship arrangements, but the ABAC Adjudication Panel interprets the code so as not to apply to this form of promotion. This appears to be a commonly held view of the code's application. See, e.g., National Committee for the Review of Alcohol Advertising, above n 147, 32.

¹⁵¹ See, e.g., ABAC Complaints Panel, *Determination No: 7-8/11* (21 February 2011) <<http://www.abac.org.au/adjudication/7-8/11>>.

¹⁵² *Ibid* 12.

¹⁵³ *Ibid* 8.

¹⁵⁴ Wendy Loxley et al, 'Alcohol Policy and Harm Reduction in Australia' (2005) 24(6) *Drug and Alcohol Review* 559, 563.

¹⁵⁵ See ABAC Complaints Panel, *Determination No: 24/10* (8 July 2010) 7 <<http://www.abac.org.au/publications/adjudication/24-10/>>.

¹⁵⁶ *Ibid*.

¹⁵⁷ Drugs and Crime Prevention Committee, Parliament of Victoria, 'Inquiry into Strategies to Reduce Harmful Alcohol Consumption: Final Report' (2006) vol 1, xxxv <http://www.parliament.vic.gov.au/images/stories/committees/dcpc/alcoholharmreduction/DCPC-Report_Alcohol_Vol1_2006-03.pdf>.

sports organisations in Australia.¹⁵⁸ Sponsorship of major Australian professional and community sporting organisations is a widespread practice among both food and alcohol companies,¹⁵⁹ with companies promoting unhealthy foods more likely to support children's sports.¹⁶⁰ Tobacco companies were also a major sports sponsor until the late 1980s, when state and federal legislation progressively banned tobacco sponsorship.¹⁶¹ Food and alcohol sponsorship combines logo exposure during the event itself, naming of series, advertising at sports stadia, promotional clothing for players and fans, and endorsements by sports personalities in television advertising.¹⁶² Sponsorship builds brand recognition and enhances the reputation of the food and alcohol industries,¹⁶³ as well as providing much needed funding for community sporting and cultural events.¹⁶⁴ However, links between alcohol and sports events create mixed messages about the appropriate role of alcohol in community life.¹⁶⁵ Sports organisations also become reliant upon food and alcohol industry funding (as was the case with tobacco industry sponsorship), meaning that they become supporters of industry interests and resist any efforts to moderate alcohol sponsorship of sports.¹⁶⁶

¹⁵⁸ See, e.g., F Stanley and M Daube, 'Should Industry Care for Children? Public Health Advocacy and Law in Australia' (2009) 123(3) *Public Health* 283, 285-286; Bridget Kelly et al, 'Role Modelling Unhealthy Behaviours: Food and Drink Sponsorship of Peak Sporting Organisations' (2011) 22(1) *Health Promotion Journal of Australia* 72.

¹⁵⁹ Drugs and Crime Prevention Committee, 'Inquiry into Strategies to Reduce Harmful Alcohol Consumption: Final Report' (vol 1), above n 157, 393-394; Geoffrey Munro and Johanna de Wever, 'Culture Clash: Alcohol Marketing and Public Health Aspirations' (2008) 27(2) *Drug and Alcohol Review* 204, 209; Jill Sherriff and Mike Daube, 'Cricket: Notching up Runs for Food and Alcohol Companies?' (2009) 34(1) *Australian and New Zealand Journal of Public Health* 19, 19-20; Bridget Kelly et al, 'Food and Drink Sponsorship of Children's Sport in Australia: Who Pays?' (2010) 26(2) *Health Promotion International* 188.

¹⁶⁰ Drugs and Crime Prevention Committee, 'Inquiry into Strategies to Reduce Harmful Alcohol Consumption: Final Report' (vol 1), above n 157, 393-394; Sherriff and Daube, above n 159; Kelly et al, 'Food and Drink Sponsorship of Children's Sport in Australia: Who Pays?' above n 159.

¹⁶¹ Sherriff and Daube, above n 159, 19-20. See, e.g., *Tobacco Advertising Prohibition Act 1992* (Cth); *Public Health (Tobacco) Act 2008* (NSW) s 20.

¹⁶² Sherriff and Daube, above n 159, 20; Kelly et al, 'Food and Drink Sponsorship of Children's Sport in Australia: Who Pays?' above n 159.

¹⁶³ Ibid; Sally Casswell, 'Alcohol Brands in Young Peoples' Everyday Lives: New Developments in Marketing' (2004) 39(6) *Alcohol and Addiction* 471, 473; Jennifer L Harris et al, 'A Crisis in the Marketplace: How Food Marketing Contributes to Childhood Obesity and What Can be Done' (2009) 30 *Annual Review of Public Health* 211, 215.

¹⁶⁴ Drugs and Crime Prevention Committee, 'Inquiry into Strategies to Reduce Harmful Alcohol Consumption: Final Report' (vol 1), above n 157, 395.

¹⁶⁵ Ibid.

¹⁶⁶ See, e.g., Drugs and Crime Prevention Committee, Parliament of Victoria, 'Inquiry into Strategies to Reduce Harmful Alcohol Consumption: Final Report' (March 2006) vol 2, 1067 <http://www.parliament.vic.gov.au/images/stories/committees/dpcp/assaults/2006_Mar_Final_report_Vol_2_Strats_to_reduce_harmful_alcohol_consumption.pdf>; Simon Chapman, 'Anatomy of a Campaign: The Attempt to Defeat the New South Wales (Australia) Tobacco Advertising Prohibition Bill' (1992) 1(1) *Tobacco Control* 50; Ian Tyrrell, *Deadly Enemies: Tobacco and Its Opponents in Australia* (UNSW Press, 1999) 185-190.

A further concern is that sports sponsorship influences children and parents' brand recall and beliefs, as well as their preferences for sponsoring companies' products.¹⁶⁷ One study of Australian children aged from 10 to 14 years found that over 74 per cent of children were aware of the businesses that sponsored their local sports club.¹⁶⁸ Sixty-nine per cent thought that food and beverage sponsors were 'cool' and 59 per cent said that they would buy sponsors' products.¹⁶⁹ Most children had received a voucher from a food or beverage company to reward good sporting performance, and of these 30 per cent reported liking the company more after receiving this reward.¹⁷⁰ As discussed above, the QSRI was recently amended so that food prizes and gift vouchers from food company sponsors must be for 'healthier choices'. However, this provision only covers 'children's sporting events' so that companies can still promote unhealthy products to children at other events or training sessions.¹⁷¹

Public health advocates argue that sports sponsorship by food and alcohol companies should be replaced by government or health promotion organisation funding, similar to the model used to replace tobacco sponsorship.¹⁷² They also call for sponsorship to be restricted by advertising regulatory instruments.¹⁷³ For example, the RCMI and QSRI could prohibit the use of sports celebrity endorsements in advertising for unhealthy products.¹⁷⁴ While the food industry has taken some action in this area, the government shows little interest in expanding regulation of sponsorship arrangements. For example, the 2003 review of the ABAC by the National Committee for the Review of Alcohol Advertising did not recommend that sponsorship be defined as advertising for the purposes of the code.¹⁷⁵

¹⁶⁷ Helen Dixon et al, 'Parent's Responses to Nutrient Claims and Sports Celebrity Endorsements on Energy-Dense and Nutrient-Poor Foods: An Experimental Study' (2011) 14(6) *Public Health Nutrition* 1071; Simone Pettigrew et al, 'Game On: Do Children Absorb Sports Sponsorship Message?' (2013) (*FirstView Article*) *Public Health Nutrition* 1 <<http://dx.doi.org/10.1017/S1368980012005435>>; Amy Bainbridge, 'Sports Stars Influence Boys' Choice of Food', *ABC News* (online) 28 May 2013 <<http://www.abc.net.au/news/2013-05-28/hold-hold-sports-stars-influence-boys-choice-of-food/4715948>>.

¹⁶⁸ Bridget Kelly et al, "'Food Company Sponsors are Kind, Generous and Cool": (Mis)conceptions of Junior Sports Players' (2011) 8(95) *International Journal of Behavioural Nutrition and Physical Activity* 72, 77.

¹⁶⁹ *Ibid* 98.

¹⁷⁰ *Ibid*.

¹⁷¹ Lumley, Martin and Antonopoulos, above n 95, 13.

¹⁷² See Sherriff and Daube, above n 159, 19; Kelly et al, 'Food and Drink Sponsorship of Children's Sport in Australia: Who Pays?' above n 159, 194; CD Holman et al, 'Banning Tobacco Sponsorship: Replacing Tobacco with Health Messages and Creating Health-Promoting Environments' (1997) 6(2) *Tobacco Control* 115.

¹⁷³ Sherriff and Daube, above n 159, 23.

¹⁷⁴ See Dixon et al, above n 167, 1078.

¹⁷⁵ National Committee for the Review of Alcohol Advertising, above n 147, 32.

As part of the National Binge Drinking Strategy, the Federal government granted \$25 million to a Community Sponsorship Fund, which provides sporting organisations with an alternative source of funding to alcohol sponsorship.¹⁷⁶ The Fund is a first step towards reducing the dependence of sporting and cultural organisations on alcohol sponsorship.¹⁷⁷ Yet some of Australia's main sporting codes have not joined this voluntary program, including Australian Football League (AFL) and the National Rugby League (NRL).¹⁷⁸ Further, the amount of funding allocated to the program is dwarfed by alcohol industry spending on sports sponsorship arrangements, estimated to be approximately \$50 million per year.¹⁷⁹ Thus, the Fund is unlikely to be effective in reducing the amount of alcohol advertising viewed by children unless it is accompanied by stronger restrictions on sponsorship (and other forms of promotion) that appeal to young audiences, or to which young people are widely exposed.¹⁸⁰ At present, sports sponsorship presents a relatively intractable barrier to comprehensive coverage of food and alcohol marketing that children are exposed to.

5. Advertising 'healthier dietary choices' under the food industry codes

Under the RCMI and QSRI, the ASB must consider whether an advertised product is a 'healthier dietary choice' that can be advertised to children. As discussed above, the RCMI does not contain uniform nutrition criteria for distinguishing between healthy and less healthy products.¹⁸¹ Instead, signatory companies use either an existing government or health organisation criteria, or their own company-developed nutrient profile model. To date, the 17 signatory companies have nominated approximately 14 different sets of criteria for use, with each one comprising different nutrition criteria in relation to total energy, salt, sugar and saturated fat. Five companies use their own nutrient profiling models,¹⁸² and research on these

¹⁷⁶ Australian National Preventive Health Agency, *National Binge Drinking Strategy* (15 February) <<http://anpha.gov.au/internet/anpha/publishing.nsf/Content/NBDS>>.

¹⁷⁷ Cancer Council NSW, Submission to Department of Health, *Consultation Paper on Community Sponsorship Fund*, 21 August 2012, 1 <<http://www.cancer.org.au/content/pdf/CancerControlPolicy/Submissions/101115-CCA-submission-CSF.pdf>>.

¹⁷⁸ 'Sporting Codes Pledge to Refuse Alcohol Sponsorship', *ABC News* (online) 23 June 2012 <<http://www.abc.net.au/news/2012-06-23/sporting-codes-pledge-to-refuse-alcohol-sponsorship/4088326>>.

¹⁷⁹ Julian Lee, 'Alcohol Empire Strikes Back', *The Sydney Morning Herald* (online) 15 March 2008 <<http://www.smh.com.au/news/national/alcohol-empire-strikes-back/2008/03/14/1205472088601.html?page=fullpage#contentSwap1>>, cited in Cancer Council NSW, above n 177, 3.

¹⁸⁰ Cancer Council NSW, above n 177, 6.

¹⁸¹ See also Mike Rayner, Peter Scarborough and Asha Kaur, 'Nutrient Profiling and the Regulation of Marketing to Children. Possibilities and Pitfalls' (2013) 62 *Appetite* 232.

¹⁸² Australian Communications and Media Authority, 'Industry Self-Regulation of Children's Food and Beverage Advertising: ACMA Monitoring Report', above n 70, 13; Lana Hebden et al, 'Regulating the Types of

criteria found that they were more lenient than those created by government and health organisations, setting higher thresholds for undesirable nutrients.¹⁸³ Their permissive approach allowed companies to advertise a wide range of unhealthy foods to children, including some that would be restricted in marketing under independent nutrient profiling schemes.¹⁸⁴ These products included Kellogg's Nutri-Grain breakfast cereal, of which 32 per cent of the kilojoule content is from added sugars, and Nestlé's Kit Kat chocolate, containing 31 per cent of the kilojoule content as saturated fats and just under 40 per cent from sugars.¹⁸⁵

The QSRI contains a nutrient profiling scheme that all signatories must use to identify 'healthy choice products' that can be advertised to children.¹⁸⁶ It applies only to 'children's meals' and sets out required meal composition, maximum energy levels and limits on undesirable nutrients.¹⁸⁷ Given that only a small proportion of fast-food advertising is specifically for children's meals, the QSRI criteria covers a minority of all marketing.¹⁸⁸ For example, they do not extend to family meals that are intended for consumption by both adults and children, and which contain energy levels far in excess of children's requirements.¹⁸⁹ Additionally, the QSRI allows signatories to advertise products that combine foods and beverages of varying nutritional quality. McDonald's Happy Meals include healthier options such as apple slices and low fat milk, along with the hamburger, French fries and soft drink that traditionally comprise the meal.¹⁹⁰ McDonald's may advertise this healthier choice Happy Meal to children, while it continues to retail other less healthy options.¹⁹¹

Foods and Beverages Marketed to Australian Children: How Useful are Food Industry Commitments?' (2010) 67(4) *Nutrition & Dietetics* 258.

¹⁸³ Hebden et al, 'Regulating the Types of Foods and Beverages Marketed to Australian Children: How Useful are Food Industry Commitments?' above n 182, 265.

¹⁸⁴ Ibid 263-264.

¹⁸⁵ Ibid 264. For the Kellogg Global Nutrient Criteria see Kellogg's, *The Responsible Children's Marketing Initiative Company Action Plan* (2010) 3 Australian Food and Grocery Council <<http://www.afgc.org.au/industry-codes/advertising-to-children/rcmi/company-action-plans.html>>. For Nestlé's nutritional profiling system see Nestlé, *The Nestlé Nutritional Profiling System, Its Product Categories and Sets of Criteria* (undated) <<http://www.research.nestle.com/nutritionhealth/nutritionalprofiling>>; Nestlé Australia, *The Responsible Children's Marketing Initiative Company Action Plan* (2010) 3 Australian Food and Grocery Council <<http://www.afgc.org.au/industry-codes/advertising-to-children/rcmi/company-action-plans.html>>.

¹⁸⁶ Australian Food and Grocery Council, *Appendix 1 - Nutrition Criteria for Assessing Children's Meals*, above n 13.

¹⁸⁷ Ibid.

¹⁸⁸ Hebden et al, 'Advertising of Fast-Food to Children on Australian Television: The Impact of Industry Self-Regulation', above n 35.

¹⁸⁹ Ibid 23; Australian Communications and Media Authority, 'Industry Self-Regulation of Children's Food and Beverage Advertising: ACMA Monitoring Report', above n 70, 12.

¹⁹⁰ See McDonald's, *Happy Meals* (undated) <http://www.mcdonalds.com/us/en/food/meal_bundles/happy_meals.html#>.

¹⁹¹ Hebden et al, 'Advertising of Fast-Food to Children on Australian Television: The Impact of Industry Self-Regulation', above n 35, 23.

6. Advertising message requirements

A final factor that the ASB will consider under the RCMI and QSRI is whether an advertisement promotes healthy eating options and physical activity. For example, the RCMI states that in advertising to children, the advertised product must be a healthy dietary choice, and advertising messaging must encourage good dietary habits and physical activity.¹⁹² This is a less frequently considered aspect of the codes, because most determinations turn on whether an advertisement is directed primarily to children. However, one example comes from an animated television advertisement for Unilever's Paddle Pops, which was set in a jungle.¹⁹³ The ASB found that Paddle Pops were a healthier choice option, and that the advertisement was 'clearly directed primarily to children'.¹⁹⁴ The RCMI permitted healthy choice products to be advertised to children, provided that advertising messaging referenced a healthy lifestyle.¹⁹⁵ However, the code required that advertising promote both good dietary habits *and* physical activity. Further, companies had to actively promote good dietary habits and a healthy lifestyle, rather than simply refraining from encouraging excessive consumption.¹⁹⁶ While not depicting unhealthy eating habits, the advertisement did not meet this second, positive requirement,¹⁹⁷ and the fact that the advertisements depicted a jungle scene and described an 'adventure' did not amount to an encouragement of physical activity. Thus, the advertisement did not meet the advertising messaging requirements of the RCMI.¹⁹⁸

The ASB takes a relatively strong position on the advertising messaging provision, requiring RCMI participants to promote a healthy lifestyle and to encourage both healthy consumption *and* physical activity. Given that the ASB rarely considers this element of the codes, its determinations are unlikely to benefit the majority of complainants. Further, researchers question whether promoting physical activity or healthy lifestyles in food advertising can ameliorate the effects of unhealthy food promotion.¹⁹⁹ Food marketing traditionally creates an association between unhealthy products and exercise (for example, through the use of sports

¹⁹² Australian Food and Grocery Council, *Responsible Children's Marketing Initiative*, above n 2, 2.

¹⁹³ Advertising Standards Bureau, *Case Report 0454/11* (7 December 2011)

<<http://www.adstandards.com.au/casereports/determinations>>.

¹⁹⁴ *Ibid* 8-10.

¹⁹⁵ *Ibid* 10.

¹⁹⁶ *Ibid*.

¹⁹⁷ *Ibid*.

¹⁹⁸ *Ibid*. Unilever appealed this decision, but the independent reviewer upheld the ASB's findings (see pp 16-23).

¹⁹⁹ Harris, Brownell and Bargh, above n 27, 227

celebrities in advertising), giving promotions a ‘healthy halo’.²⁰⁰ This approach obscures the fact that some products (such as large sized fast-food meals) would require individuals to run a marathon to expend the calories these products contain.²⁰¹ Also, research has found that participants who viewed exercise promotions increased their consumption of snack food,²⁰² although a more recent study produced the opposite effect.²⁰³

7. Conclusion

Although the RCMI and QSRI’s conditions look comprehensive at first glance, in practice they contain numerous ‘escape’ clauses, and the findings from the ASB’s determinations confirms the food industry’s willingness to use them. The escape clauses are summarised in Table 14 below. The cumulative impact of the initiatives’ terms and definitions is that their substantive controls rarely operate, and when they do, they make few demands of advertisers. The escape clauses in the various terms and conditions help to explain the research findings that the RCMI and QSRI do not significantly reduce children’s exposure to unhealthy food and beverage advertising, nor are they likely to reduce the persuasive power of this advertising.²⁰⁴

²⁰⁰ Harris et al, 'Defining "Child-Directed Advertising" to Reduce Unhealthy Television Food Advertising', above n 29, 217. See also Jeffrey P Koplan and Kelly D Brownell, 'Response of the Food and Beverage Industry to the Obesity Threat' (2010) 304(13) *Journal of the American Medical Association* 1487.

²⁰¹ Koplan and Brownell, above n 200.

²⁰² Dolores Albarracin, Wei Wang and Joshua Leeper, 'Immediate Increase in Food Intake Following Exercise Messages' (2009) 17(7) *Obesity* 1451.

²⁰³ Ellen van Kleef, Mitsuru Shimizu and Brian Wansink, 'Food Compensation: Do Exercise Ads Change Food Intake?' (2011) 8(6) *International Journal of Behavioural Nutrition and Physical Activity* 6.

²⁰⁴ See King et al, 'Industry Self-Regulation of Television Food Advertising: Responsible or Responsive?' above n 35; Hebden et al, 'Advertising of Fast-Food to Children on Australian Television: The Impact of Industry Self-Regulation', above n 35; King et al, 'Building the Case for Independent Monitoring of Food Advertising on Australian Television', above n 35.

Table 14. The RCMI and QSRI's escape clauses

Element of the initiatives	Escape clause
Definition of children	The codes only apply to a narrow range of ages (i.e. children under 12 or 14 years of age).
Media directed to children	The codes contain a limited definition of media that is 'directed primarily to children', which does not apply to children's peak television viewing times or to general audience programs that are popular with children.
Advertising content directed to children	The codes only cover advertising that is 'directed primarily to children' according to its creative content. This criterion is interpreted narrowly by the ASB, meaning that children are exposed to advertising that they find appealing but which is directed to a general audience.
Media channels and promotional techniques	The codes do not cover all media channels and promotional techniques that are used to advertise food to children. Further, the ASB narrowly interprets the restrictions on persuasive techniques contained in the RCMI and QSRI, meaning that they do not apply in most cases.
Advertising for food and beverage products	The codes cover a restricted range of foods and beverages, allowing companies to market the majority of their (unhealthy) products to children.
Advertising messaging requirements	While the RCMI and QSRI create a positive requirement to promote healthy lifestyles, the ASB is rarely required to consider this component of the initiatives.

A comparison of food and alcohol advertising codes illustrates some of the fundamental limitations of advertising self-regulation. Self-regulation attempts to carve out and restrict a small segment of advertising that specifically targets children, while ignoring the potential influence of adult-directed advertising on young people. It regulates some forms of advertising content, narrowly defined, but rarely an advertisement's placement. It often defines advertising in a way that excludes important marketing techniques such as sponsorship. Since the self-regulatory schemes governing alcohol advertising and food advertising to children have been designed to have minimal impact on current advertising practices, government intervention will be required if the goal of reducing children's exposure to such advertising is to be achieved.²⁰⁵

Table 15 outlines some of gaps that would need to be covered in the food industry's scheme, if it is to provide more wide reaching restrictions that reduce children's exposure to unhealthy food advertising, as well as advertising's persuasive power. In the conclusion of this thesis I consider how these improvements might be implemented in a step-wise manner, in order to

²⁰⁵ See also Hawkes, 'Self-Regulation Of Food Advertising: What It Can, Could And Cannot Do To Discourage Unhealthy Eating Habits Among Children', above n 1, 381.

incrementally strengthen the existing voluntary scheme.²⁰⁶ The flaws in the content of the RCMI and QSRI are exacerbated by failures in the self-regulatory processes established by these codes.²⁰⁷ In order to effect changes to the nature and volume of food advertising to children, improvements to the substantive controls in the codes would need to be accompanied by changes in the design and implementation of the self-regulatory scheme. Thus, the next chapter considers the governance processes established by the initiatives, and whether they are likely to foster effective and credible self-regulation.

²⁰⁶ See World Health Organisation, 'A Framework for Implementing the Set of Recommendations on the Marketing of Foods and Non-Alcoholic Beverages to Children', above n 28, 16.

²⁰⁷ See, e.g., Lumley, Martin and Antonopoulos, above n 95, 9, 15-19; Belinda Reeve, 'Private Governance, Public Purpose? Assessing Transparency and Accountability in Self-Regulation of Food Advertising to Children' (2013) 10(2) *Journal of Bioethical Inquiry* 149.

Table 15. Proposed improvements to the terms and conditions of the RCMI and QSRI

Element of the codes	Proposed improvement
Definition of children	Includes children under the age of 16 at a minimum, but preferably up to the age of 17, given that older children and adolescents are vulnerable to the influence of food advertising. ²⁰⁸
Media directed to children	Defined as marketing communications intended exclusively for children (e.g., C and P television programs), those with a marked appeal to children (according to the creative content of the media) and media viewed by a large number of children. ²⁰⁹ This could include restricting advertising during children’s peak television viewing times (e.g., from 6-9am and 4-9pm on weekdays and 6am-12pm and 4-9pm on weekends and during school holidays). ²¹⁰ Alternatively, unhealthy food advertising could be prohibited before 9pm. ²¹¹
Advertising directed to children	Defined as advertisements that are intended/likely to appeal to children, regardless of whether they also appeal to other age groups, as well as advertisements that are likely to be seen and heard by children. ²¹² Specific factors to be considered include the circumstances in which the advertisement was communicated (the mode, location, timing and placement of the advertisement), its execution (e.g. the use of humour) and the type of product advertised. ²¹³
Media channels and promotional techniques	The definition of ‘media’ should apply to all communication channels, including social networking sites, product labelling and packaging and point-of-sale material. The codes should be based on a broad definition of marketing that includes non-specific brand advertising, premium offers and other giveaways and sponsorship arrangements. ²¹⁴ Advertising and promotion could be restricted at events and in settings where large numbers of children gather, including child care centres, schools and playgrounds. ²¹⁵
Advertising for food and beverage products	The codes should be based on uniform nutrition criteria that place demanding standards on participating companies, and are determined by an independent organisation and/or a government agency. ²¹⁶ Alternatively, restrictions apply to all food and beverage advertising to children, with the exception of fresh fruit and vegetables. ²¹⁷

²⁰⁸ MacKay et al, above n 29, 30.

²⁰⁹ Ibid 34.

²¹⁰ Ibid 5.

²¹¹ World Health Organisation, 'A Framework for Implementing the Set of Recommendations on the Marketing of Foods and Non-Alcoholic Beverages to Children', above n 28, 23.

²¹² MacKay et al, above n 29, 5.

²¹³ Ibid 31-33.

²¹⁴ Ibid 30-31.

²¹⁵ World Health Organisation, 'A Framework for Implementing the Set of Recommendations on the Marketing of Foods and Non-Alcoholic Beverages to Children', above n 28, 22-23; World Health Organisation, 'Set of Recommendations on the Marketing of Foods and Non-Alcoholic Beverages to Children' (World Health Organisation 2010) 9 <<http://www.who.int/dietphysicalactivity/marketing-food-to-children/en/index.html>>.

²¹⁶ See, e.g., MacKay et al, above n 29, 30; Tymms, above n 38, 59.

²¹⁷ See, e.g., Committee of Advertising Practice, *The CAP Code: The UK Code of Non-Broadcast Advertising, Sales Promotion and Direct Marketing* (2010) cls 15.14.1., 15.15. <<http://www.cap.org.uk/Advertising-Codes/Non-broadcast-HTML/Section-15-Food,-food-supplements-and-associated-health-or-nutritional-claims.aspx>>. See also World Health Organisation, 'A Framework for Implementing the Set of Recommendations on the Marketing of Foods and Non-Alcoholic Beverages to Children', above n 28, 17.

CHAPTER 7

The design of food industry self-regulation

This chapter complements Chapter 6, which analysed the substantive content of the food industry's voluntary initiatives. Here I assess the RCMI and QSRI against recommendations for the design and implementation of self-regulatory codes drawn from government and academic literature. I divide these recommendations into the different stages of the regulatory process, namely:

- The development of code objectives;
- Administration, monitoring and data collection;
- Complaints handling;
- Enforcement; and
- Review.

Table 16 summarises the comparison between food industry self-regulation and best practice principles for regulatory design.¹ The chapter explores each principle in turn. A key focus of the chapter is whether regulatory processes foster self-regulation that is transparent and accountable to external stakeholder groups. This is a key element in effective and credible private regulation, especially where public interests (including the public health interest) are involved.² The chapter largely draws upon my documentary analysis, although I also consider findings from the independent review of the two codes conducted in 2012.³ In addition, I make reference to the Australian alcohol industry's ABAC Scheme,⁴ as well as to other

¹ Chapter 4 described the literature I used to create a framework for evaluating whether self-regulation is likely to be effective, which includes the institutional design and implementation of voluntary programs.

² See, e.g., Julia Black, 'Proceduralising Regulation: Part 1' (2000) 20(4) *Oxford Journal of Legal Studies* 597; Directorate-General for Health and Consumer Protection, 'Self-Regulation in the EU Advertising Sector: A Report of Some Discussion Among Interested Parties' (European Commission, July 2006) 3 <http://ec.europa.eu/consumers/hot_topics/report_advertising_en.htm>; Lisa L Sharma, Stephen P Teret and Kelly D Brownell, 'The Food Industry and Self-Regulation: Standards to Promote Success and to Avoid Public Health Failures' (2010) 100(2) *American Journal of Public Health* 240.

³ Susannah Tymms, 'Responsible Advertising to Children: An Independent Review of the Australian Food and Beverage Industry Self-Regulatory Codes' (AGFC, October 2012) 55 <<http://www.afgc.org.au/industry-codes/advertising-to-children/rcmi/rcmi-reports-2009.html>>. See also Healthy Kids Association, *Final Report on the Compliance of Signatories to the Australian Quick Service Restaurant Industry Initiative for Responsible Advertising to Children* (October 2011) Australian Food and Grocery Council <<http://www.afgc.org.au/tools-guides-.html>>.

⁴ The ABAC Scheme Limited, *Alcohol Beverages Advertising (and Packaging) Code* (March 2012) <<http://www.abac.org.au/publications/thecode/>>.

advertising regulatory instruments in Australia and other jurisdictions. I use these to illustrate how the self-regulatory processes attached to the RCMI and QSRI could be strengthened.

Table 16. Comparing the RCMI and QSRI with recommendations for best practice for the design of self-regulatory schemes

Aspect of scheme	Objectives	Administration	Monitoring and data collection	Complaints handling	Incentives for compliance	Review
Recommendation	Code should identify the goal to be achieved and measurable objectives. Consultation with external parties in processes of code development.	Fair and transparent management through a committee including external stakeholders. Alternatively, use of an independent body for administration.	Monitoring of compliance and outcomes by an independent organisation, with reports made publicly available.	The code should establish a complaints handling mechanism with recourse to an independent body.	Wide range of sanctions available for non-compliance, tailored to the seriousness of the breach. The code is widely publicised, including details of poor performers and high achievers.	Structured, regular review of the scheme by an external third-party.
RCMI	Vague goals related to responsible marketing and promoting healthier products/lifestyle choices. No identified targets for participants to achieve. Little consultation with external parties when developing code.	An industry body (the AFGC) administers the RCMI through a formal management structure, including monitoring, reporting on and encouraging compliance.	Relies upon company self-reports and AFGC monitoring activities. Results of monitoring are publicly released in the annual Compliance Report and Activity Report.	ASB hears complaints about food advertising. Operates independently from the advertising and food industries.	ASB may order modification or removal of advertisement but no evidence that this affects companies' behaviour. Little evidence of active enforcement by ASB or AFGC.	AFGC commissioned independent review of the RCMI and QSRI in 2012, but has not established a program of on-going review.
QSRI	As above.	AFGC took over administration from 2011, previously managed by the AANA.	No monitoring and reporting until the AFGC took charge of the code in 2011.	As above.	As above.	Healthy Kids Association reviewed the scheme in the first year of operation, part of a second independent review in 2011.

1. Developing codes objectives

Voluntary codes should set out the goals that they aim to achieve, as well as an explicit set of objectives that relate to these goals.⁵ Identifying self-regulation's objectives helps participants choose appropriate methods of compliance and explains to interested parties the intent behind the scheme.⁶ The objectives of the code should be framed in a manner that allows them to be measured; this ensures that the success or failure of the code can be quantified through monitoring and audits.⁷ Ideally, codes should include performance indicators developed with reference to criteria for good regulatory design, as well as defined targets for participants to achieve.⁸ Concrete targets enable information about companies' performance to be collected and analysed, and for comparisons to be made between companies (benchmarking).⁹ The capacity for objective assessment of the performance of the scheme also enhances its credibility in the eyes of the public.¹⁰

Self-regulation can be made more transparent by including representation from multiple interests in processes of code creation.¹¹ External stakeholder representation can also help to identify the problems that self-regulation should address, and to ensure that the goals of the code reflect its underlying public purpose.¹² However, where industry leads the development of voluntary schemes, companies may challenge the participation of external stakeholders. Industry actors may dispute the inclusion of consumer and advocacy groups on the basis that

⁵ Neil Gunningham, 'Environment, Self-Regulation and the Chemical Industry: Assessing Responsible Care' (1995) 17(1) *Law & Policy* 57, 71; Department of Treasury and Finance, 'Victorian Guide to Regulation' (State of Victoria, August 2011) 21 <<http://www.dtf.vic.gov.au/Publications/Victoria-Economy-publications/Victorian-guide-to-regulation>>.

⁶ Department of Treasury and Finance, above n 5, 21; Australian Competition and Consumer Commission, 'Guidelines for Developing Effective Voluntary Industry Codes of Conduct' (ACCC, July 2011) 6 <<http://www.accc.gov.au/content/index.phtml/itemId/658186>>.

⁷ Australian Competition and Consumer Commission, above n 6, 6.

⁸ Ibid 13; Organisation for Economic Co-Operation and Development, 'Corporate Responsibility: Private Initiatives and Public Goals' (OECD, 2001) 70 <<http://www.oecd.org/daf/inv/corporateresponsibility/>>; Neil Gunningham and Darren Sinclair, *Leaders and Laggards: Next-Generation Environmental Regulation* (Greenleaf, 2002) 145-146.

⁹ Gunningham, above n 5, 71.

¹⁰ Ibid; Australian Competition and Consumer Commission, above n 6, 13.

¹¹ Sharma, Teret and Brownell, above n 2, 241.

¹² Government of Canada, *Voluntary Codes: A Guide for Their Development and Use* (March 1998) 12-13; Industry Canada <<http://www.ic.gc.ca/eic/site/oca-bc.nsf/eng/ca00863.html>>; Taskforce on Industry Self-Regulation, 'Industry Self-Regulation in Consumer Markets' (Commonwealth of Australia, 2000) 60 <<http://archive.treasury.gov.au/contentitem.asp?ContentID=1123>>. See also Debra Harker and Michael Harker, 'The Role of Codes of Conduct in the Advertising Self-Regulatory Framework' (2000) 20(2) *Journal of Macromarketing* 155, 157-159; Sarah MacKay, 'Food Advertising and Obesity in Australia: To What Extent Can Self-Regulation Protect the Interests of Children?' (2009) 35 *Monash University Law Review* 118, 123; National Heart Forum, *An Analysis of the Regulatory and Voluntary Landscape Concerning the Marketing and Promotion of Food and Drink to Children* (2011) 107 <<http://www.heartforum.co.uk/our-work/policy/nutrition/marketing-food-and-drink-to-children/>>.

these groups do not understand the nature of the industry in question and are not subject to the regulatory scheme being created.¹³ Thus, industry bodies need to carefully balance the interests of internal and external stakeholders in developing voluntary programs. Due to the concerns of their members, industry bodies may prefer a lower level of external stakeholder involvement in code creation, including from government, consumers and other affected parties.¹⁴

The objectives of food industry self-regulation

The RCMI and QSRI contain vague objectives relating to social responsibility in advertising and promoting healthier foods and lifestyle choices to children.¹⁵ The goal of the RCMI is ‘to ensure a high level of social responsibility in marketing food and beverage products in Australia’.¹⁶ The QSRI ‘provides a common framework for quick service restaurant companies to ensure that only food and beverages that represent healthier choices are promoted directly to children...’¹⁷ The 2012 review of the codes pointed out that these objectives are subjective and imprecise, making them difficult to measure.¹⁸ They also allow for wide-ranging interpretation by participant companies, potentially creating variation in how companies modify their marketing practices to comply with the codes.¹⁹ Further, the industry claims that it created the initiatives to address concerns about advertising and childhood obesity,²⁰ yet the codes make no reference to public health objectives like changing children’s eating patterns or improving dietary health.²¹

¹³ Virginia Haufler, *A Public Role for the Private Sector: Industry Self-Regulation in a Global Economy* (Carnegie Endowment for International Peace, 2001) 18.

¹⁴ Australian Competition and Consumer Commission, above n 6, 5; European Advertising Standards Alliance, *International Guide to Developing a Self-Regulatory Organisation* (2009) 16 <<http://www.easa-alliance.org/Publications/Guides-on-Self-Regulation/page.aspx/267>>; Australian Government, 'Best Practice Regulation Handbook' (Australian Government, 2011) 43-44 <<http://www.finance.gov.au/obpr/proposal/gov-requirements.html>>.

¹⁵ Tymms, above n 3, 53-54.

¹⁶ Australian Food and Grocery Council, *The Responsible Children’s Marketing Initiative of the Australian Food and Beverage Industry* (March 2011) 1 <<http://www.afgc.org.au/industry-codes/advertising-kids.html>>.

¹⁷ Australian Quick Service Restaurant Industry, *Initiative for Responsible Advertising and Marketing to Children* (June 2009) 1 Australian Association of National Advertisers <<http://www.aana.com.au/QuickServiceRestaurantInitiative.htm>>.

¹⁸ Tymms, above n 3, 53.

¹⁹ Ibid.

²⁰ See Australian Food and Grocery Council, *Food and Beverage Advertising to Children: Activity Report* (December 2010) 5 <<http://www.afgc.org.au/industry-codes/advertising-kids/rcmi-reports-2009.html>>.

²¹ See Nancy E Kass, 'An Ethics Framework for Public Health' (2001) 91(11) *Public Health Matters* 1776, 1777.

Not only is there confusion among participants about what the codes aim to achieve, other stakeholders also debate the goals of the RCMI and QSRI. As discussed in Chapter 4, the food industry argues that the initiatives aim to reduce a very specific form of marketing activity, i.e. unhealthy food advertising that directly targets children.²² In contrast, WHO recommends that restrictions should aim to reduce children's exposure to, and the persuasive power of, unhealthy food marketing.²³ This is a more meaningful objective than eliminating marketing that directly targets children.²⁴ Accordingly, the initiatives should create clear, measurable objectives that relate to this goal, for example, by reducing the frequency of unhealthy food advertising during children's peak television viewing periods.²⁵ Measurable objectives with timeframes for meeting them would allow the scheme's success to be assessed more accurately, including by parties external to industry.²⁶

The initiatives' ambiguous goals reflect the processes behind the development of the scheme. The AFGC formed a working group with its member companies to write the RCMI's core principles and definitions.²⁷ It also liaised with the Australian Association of National Advertisers (AANA) to ensure that the RCMI aligned with their existing codes of conduct.²⁸ The creation of the QSRI did not involve a central organising body. This voluntary pledge resulted from collaboration between Australia's four main quick service restaurants, in consultation with the AANA.²⁹ However the food industry did not consult with government, consumers, public health advocates or other affected stakeholders when developing either code. By contrast, incorporating appropriate consultation mechanisms is critical to fostering

²² Australian Food and Grocery Council, *Food and Beverage Advertising to Children: Activity Report* (May 2012) 5 <<http://www.afgc.org.au/industry-codes/advertising-to-children/rcmi/rcmi-reports-2009.html>>.

²³ World Health Organisation, 'Set of Recommendations on the Marketing of Foods and Non-Alcoholic Beverages to Children' (World Health Organisation, 2010) 8 <<http://www.who.int/dietphysicalactivity/marketing-food-to-children/en/>>. See also the recommendations of the National Preventative Health Taskforce: National Preventative Health Taskforce, 'National Preventative Health Strategy - The Roadmap for Action' (Commonwealth of Australia, 2009) 125 <<http://www.preventativehealth.org.au/internet/preventativehealth/publishing.nsf/Content/national-preventative-health-strategy-11p>>.

²⁴ See, e.g., Georgina Cairns, Kathryn Angus and Gerard Hastings, 'The Extent, Nature and Effects of Food Promotion to Children: A Review of the Evidence to December 2008' (World Health Organisation, 2009) 32 <http://www.who.int/dietphysicalactivity/publications/marketing_evidence_2009/en/index.html>.

²⁵ World Health Organisation, 'Set of Recommendations on the Marketing of Foods and Non-Alcoholic Beverages to Children', above n 23, 8.

²⁶ Ibid.

²⁷ Interview with Australian Food and Grocery Council representative, Canberra, ACT, 8 July 2011.

²⁸ Australian Food and Grocery Council, *Responsible Children's Marketing Initiative 2010 Compliance Report* (2010) 5 <<http://www.afgc.org.au/industry-codes/advertising-kids.html>>.

²⁹ Australian Quick Service Restaurant Industry, above n 17, 1.

more transparent and democratic forms of governance.³⁰ For example, the Canadian Government's guide to developing voluntary codes recommends the inclusion of external stakeholders from the very inception of self-regulation, including in working groups that draft code documents, as well as in the implementation and review of the resulting scheme.³¹

Food industry self-regulation was prompted by consumer concerns about unhealthy food advertising to children and its link to obesity.³² Yet by failing to consult with external stakeholders, the AFGC missed an opportunity to clarify the exact content of those concerns.³³ In contrast, a range of parties had input into the development of the ABAC, including advertising, media and consumer bodies, federal government ministers and departments, and the Australian Competition and Consumer Commission.³⁴ In retrospect, it cannot be said whether external stakeholder consultation would have produced clearer objectives or stronger regulatory standards in the food industry's scheme. However, by refusing to consult with external interested parties, the industry failed to gain consensus on the goals of the initiatives.³⁵ Accordingly, it defined the code's objectives in a way that is unacceptable to public health groups and which does not substantially address one of their main concerns, i.e. children's exposure to unhealthy food advertising.³⁶ In these circumstances, there is a strong argument that the industry adopted the codes to give the appearance of regulation, while not truly addressing community concerns.³⁷

³⁰ See, e.g., European Advertising Standards Alliance, above n 14, 16; David Cohen, 'The Role of the State in a Privatised Regulatory Environment' in Kernaghan Webb (ed), *Voluntary Codes: Private Governance, the Public Interest and Innovation* (Carleton Research Unit for Innovation, Science and Environment, Carleton University, 2004) 25.

³¹ Government of Canada, above n 12, 12-15.

³² See Australian Communications and Media Authority, 'Review of the Children's Television Standards 2005: Report of the Review' (Australian Government, 2008) 12 <http://www.acma.gov.au/WEB/STANDARD/pc=PC_310262>; Australian Communications and Media Authority, 'Industry Self-Regulation of Children's Food and Beverage Advertising: ACMA Monitoring Report' (Australian Government, 2011) 9-11 <<http://engage.acma.gov.au/kids-food-ads/>>.

³³ See Kernaghan Webb, 'Understanding the Voluntary Codes Phenomenon' in Kernaghan Webb (ed), *Voluntary Codes: Private Governance, the Public Interest and Innovation* (Carleton Research Unit for Innovation, Science and Environment, Carleton University, 2004) 2, 18.

³⁴ National Committee for the Review of Alcohol Advertising, 'Review of the Self-Regulatory System for Alcohol Advertising. Report to the Ministerial Council of Drug Strategy' (Minister for Health Victoria, 2003) iii <[http://docs.health.vic.gov.au/docs/doc/2E4E141E5A719092CA2578A1000A1CB0/\\$FILE/ncaareport.pdf](http://docs.health.vic.gov.au/docs/doc/2E4E141E5A719092CA2578A1000A1CB0/$FILE/ncaareport.pdf)>.

³⁵ See National Heart Forum, above n 12, 107.

³⁶ See Webb, above n 33, 18.

³⁷ MacKay, above n 12, 128-129. See also Thomas R Wortruba, 'Industry Self-Regulation: A Review and Extension to a Global Setting' (1997) 169(1) *Journal of Public Policy and Marketing* 38.

2. Administration and monitoring of voluntary codes

Good regulation is administered in a fair and transparent manner by an accountable body.³⁸ Industry associations typically manage administration by incorporating a code management committee into their existing infrastructure.³⁹ The role and functions of this committee should be written into the main code document, including monitoring compliance, reporting on the scheme's operation, and sanctioning breaches.⁴⁰ The committee should comprise representatives from stakeholder groups such as governments, consumer organisations and NGOs.⁴¹ External representation in administrative processes provides a 'public window' into voluntary schemes, making them more likely to be accepted as legitimate by external stakeholders.⁴²

Voluntary schemes should also incorporate tools for collecting data and monitoring companies' compliance.⁴³ Industry codes often require companies to self-report on their performance.⁴⁴ Some only require companies to report on their success in implementing regulatory procedures,⁴⁵ but more rigorous regimes require reporting on progress towards meeting concrete objectives.⁴⁶ Administrative committees should regularly monitor codes independently of member companies.⁴⁷ In relation to advertising self-regulation, this involves systematically reviewing advertising across all media and the extent to which it complies with applicable codes of conduct.⁴⁸ Based on these data, administrative committees can produce reports that identify systemic problems in the voluntary scheme and areas for improvement.⁴⁹ Reports also provide important feedback for industry actors, enabling them to improve their performance and increase compliance.⁵⁰ Public reporting facilitates external

³⁸ Department of Finance and Treasury, above n 5, 31.

³⁹ Australian Competition and Consumer Commission, above n 6, 8.

⁴⁰ Ibid 7-8.

⁴¹ Ibid 8.

⁴² Ibid 8-9.

⁴³ Department of Finance and Treasury, above n 5, 29.

⁴⁴ Neil Gunningham and Joseph Rees, 'Industry Self-Regulation: An Institutional Perspective' (1997) 19(4) *Law & Policy* 363, 384.

⁴⁵ See, e.g., Benjamin Cashore, Graeme Auld and Deanna Newsom, *Governing Through Markets: Forest Certification and the Emergence of Non-State Authority* (Yale University Press, 2004) 234.

⁴⁶ Gunningham, above n 5, 71.

⁴⁷ Australian Competition and Consumer Commission, above n 6, 12.

⁴⁸ Debra Harker, 'Towards Effective Advertising Self-Regulation in Australia: The Seven Components' (2003) 9(2) *Journal of Marketing Communications* 93, 102. See also European Advertising Standards Alliance, above n 14, 16; Jean J Boddewyn, *Advertising Self-Regulation and Outside Participation: A Multinational Comparison* (Quorum Books, 1988) 19.

⁴⁹ Australian Competition and Consumer Commission, above n 6, 12.

⁵⁰ Ibid; Taskforce on Industry Self-Regulation, above n 12, 60.

scrutiny of the scheme's effectiveness, enhancing consumer confidence in its operation.⁵¹ Further, code enforcement is more effective (and therefore more credible) if compliance can be effectively monitored by outside parties and non-compliant behaviour easily detected.⁵²

Administration and monitoring of the RCMI and QSRI

The AFGC secretariat administers the codes through a formal management structure, including a code administration manager.⁵³ While the AANA originally managed the QSRI, the AFGC took charge of both initiatives from 2011.⁵⁴ The AFGC communicates with signatories, undertakes advocacy and promotion for the codes, monitors compliance and publishes an annual report on the scheme's operation.⁵⁵ Its activities include contacting participants and non-participants that breach the codes and encouraging them to comply.⁵⁶ Both initiatives require participants to write a 'company action plan' outlining how they will put the codes' principles into practice,⁵⁷ and to report annually on this plan.⁵⁸ The AFGC coordinates companies' compliance reports and makes publicly available a summary of companies' activities in its annual report.⁵⁹ The code secretariat also informs signatories about government activity and any threats to self-regulation, including the actions of the Australian National Preventive Health Agency (ANPHA).⁶⁰

All participants have produced a company action plan that is consistent with the codes' core principles. However, the terms of the initiatives grant signatories discretion to shape these

⁵¹ Australian Competition and Consumer Commission, above n 6, 12; Taskforce on Industry Self-regulation, above n 12, 79.

⁵² Bryne Purchase, 'The Political Economy of Voluntary Codes' in Kernaghan Webb (ed), *Voluntary Codes: Private Governance, the Public Interest and Innovation* (Carleton Research Unit for Innovation, Science and Environment, Carleton University, 2004) 77, 87.

⁵³ Interview with Australian Food and Grocery Council representative, Canberra, ACT, 8 July 2011.

⁵⁴ Australian Food and Grocery Council, *Australian Quick Service Restaurant Industry Initiative for Responsible Advertising and Marketing to Children 2011 Compliance Report* (2011) 5 <<http://www.afgc.org.au/component/content/article/15-industry-codes/1218-qsr-initiative-reports.html>>.

⁵⁵ Tymms, above n 3, 47.

⁵⁶ Ibid 49.

⁵⁷ Australian Food and Grocery Council, *Responsible Children's Marketing Initiative*, above n 16, 3; Australian Quick Service Restaurant Industry, above n 17, 2. RCMI participants must also include the nutrition criteria that they will use to identify healthier choice products that can be advertised to children (Australian Food and Grocery Council, *Responsible Children's Marketing Initiative*, above n 16, 2).

⁵⁸ Australian Food and Grocery Council, *Responsible Children's Marketing Initiative*, above n 16, 3. QSRI participants only reported on compliance from 2011, following changes to the scheme's administration. See Australian Food and Grocery Council, *Australian Quick Service Restaurant Industry Initiative for Responsible Advertising and Marketing to Children 2011 Compliance Report*, above n 54.

⁵⁹ See Australian Food and Grocery Council, *Responsible Children's Marketing Initiative 2010 Compliance Report*, above n 28; Australian Food and Grocery Council, *Responsible Children's Marketing Initiative 2011 Compliance Report* (2011) <<http://www.afgc.org.au/industry-codes/advertising-to-children/rcmi/rcmi-reports-2009.html>>.

⁶⁰ Tymms, above n 3, 49.

plans to their own practices and product lines.⁶¹ This creates variation in the implementation of the codes at a company level.

Chapter 5 described how RCMI signatories use different nutrition criteria to identify healthier dietary choice products that can be advertised to children, including extremely lenient criteria developed by companies themselves.⁶² In other cases companies have set advertising standards that are more stringent than the codes' minimum requirements. For example, the RCMI specifies that unhealthy food advertising must not appear in television programs where more than 50 per cent of the total audience is aged 12 years or under.⁶³ Kraft has adopted a lower audience share of 35 per cent children aged between two and 12 years of age,⁶⁴ while Mars will not advertise in media where more than 25 per cent of the audience is composed of viewers under the age of 12.⁶⁵ While it is admirable that these companies have gone 'beyond compliance' with the codes, variation in company-level commitments means that 'a supposedly uniform, industry-wide effort to "change" food marketing to children is actually a highly complex picture with numerous exceptions and inconsistencies'.⁶⁶

To date, all code participants have reported on compliance for the years that they are members of the scheme.⁶⁷ Table 17 summarises RCMI signatories' reports in 2011. The strength of company self-reporting is that participants must describe their advertising practices, as well as steps taken to ensure compliance with the codes. Some companies also report on measures taken to improve product formulation and marketing, in addition to the terms of the initiatives.

⁶¹ Australian Food and Grocery Council, *Responsible Children's Marketing Initiative*, above n 16, 3; Australian Quick Service Restaurant Industry, above n 17, 2. See also Corinna Hawkes and Jennifer Harris, 'An Analysis of the Content of Food Industry Pledges on Marketing to Children' (2011) 14(8) *Public Health Nutrition* 1403, 1412.

⁶² See also Lana Hebden et al, 'Regulating the Types of Foods and Beverages Marketed to Australian Children: How Useful are Food Industry Commitments?' (2010) 67(4) *Nutrition & Dietetics* 258, 265.

⁶³ Australian Food and Grocery Council, *Responsible Children's Marketing Initiative*, above n 16, 1.

⁶⁴ Kraft Foods, *The Responsible Children's Marketing Initiative Company Action Plan* (2009) 3 Australian Food and Grocery Council <<http://www.afgc.org.au/industry-codes/advertising-to-children/rcmi/company-action-plans.html>>.

⁶⁵ Mars Snackfood Australia, *The Responsible Children's Marketing Initiative Company Action Plan* (2009) 5 Australian Food and Grocery Council <<http://www.afgc.org.au/industry-codes/advertising-to-children/rcmi/company-action-plans.html>>. See also Hawkes and Harris, above n 61, 1406-1407.

⁶⁶ Hawkes and Harris, above n 61, 1411.

⁶⁷ A QSRI *Compliance Report* is only available for 2011 due to QSRI participants not being required to report until that date. See Australian Food and Grocery Council, *Australian Quick Service Restaurant Industry Initiative for Responsible Advertising and Marketing to Children 2011 Compliance Report*, above n 54, 6.

However, the quality of participants' responses varies widely. In 2011, 12 companies reported on the specific steps they had taken to comply with the RCMI, but five did not.⁶⁸ In 2009 two RCMI signatories failed to provide nutrient criteria used to assess the nature of their products.⁶⁹ These companies claimed that they did not advertise to children, meaning that they did not need to publish their nutrient criteria.⁷⁰ Yet the fact that not all companies disclosed criteria undermines the transparency of the scheme. Variation in companies' reporting also creates difficulties for consumers in understanding the scheme's operation,⁷¹ and by reporting on compliance with their own interpretation of the codes' principles, companies can be described as 'marking their own exam papers'.⁷² Thus, companies' self-reports are not systematic, and rely upon signatories providing complete information on their advertising practices and compliance processes.⁷³ However, participants are unlikely to reveal poor behaviour that would damage their reputation.⁷⁴

⁶⁸ At the time of writing the AFGC had not yet released its report on compliance with the scheme in 2012.

⁶⁹ See Hebden et al, 'Regulating the Types of Foods and Beverages Marketed to Australian Children', above n 62, 265.

⁷⁰ See Australian Communications and Media Authority, 'Industry Self-Regulation of Children's Food and Beverage Advertising: ACMA Monitoring Report', above n 32, 13.

⁷¹ Lana Hebden et al, 'Industry Self-Regulation of Food Marketing to Children: Reading the Fine Print' (2010) 21(3) *Health Promotion Journal of Australia* 229, 234.

⁷² Gunningham and Sinclair, above n 8, 143.

⁷³ See also Lesley King et al, 'Industry Self-Regulation of Television Food Advertising: Responsible or Responsive?' (2011) 6(2 pt 2) *International Journal of Paediatric Obesity* e390, e396 <<http://onlinelibrary.wiley.com/doi/10.3109/17477166.2010.517313/full>>.

⁷⁴ Gunningham and Rees, above n 44, 384.

Table 17. Signatory companies' compliance with the RCMI in 2011⁷⁵

Company	Marketing to children?	Steps taken to meet RCMI requirements*	Other reported activity**	Breaches identified during audit period.	Complaints to the ASB
Campbell Arnott's	Yes (Tiny Teddies TV ad)	Yes	Labelling, reformulation	1 ad in children's program	None
Cereal Partners	No	None reported	>25% audience share threshold	Fully compliant	None
Coca-Cola South Pacific	No	Yes	>35% audience share threshold	30 ads in children's programs/movies	None
Fonterra	Yes (school promotion)	Yes	Ads targeted to adults	Fully compliant	None
Ferrero	No	Yes	Member of IFBA	2 ads in children's programs	None
General Mills	No	Yes	None reported	Fully compliant	None
George Weston	No	Yes	None reported	1 ad in children's program	None
Kellogg	No	None reported	Member of IFBA	Fully compliant	1 complaint dismissed
Kraft Foods	Yes (Vegemite sponsorship)	Yes	Yes ('Be Treatwise' campaign)	14 ads in children's programs	1 complaint upheld; 1 complaint dismissed
Lion Dairy and Drinks	Yes (Go Gurt, Yo Go, 'Big M' promotion)	Yes	Ads targeted to adults	Fully compliant	None
Mars	No	None reported	Making Chocolate Better' campaign	64 ads screened in children programs	2 complaints dismissed
Nestlé	No	None reported	>25% audience share threshold	4 ads in children's programs	2 complaints dismissed
Patties Foods	No	None reported	Ads targeted to adults	Fully compliant	None
PepsiCo	No	Yes	None reported	18 ads screened in children's programs	None
Sanitarium	Yes (Weetbix marketing)	Yes	None reported	Fully compliant	None
Simplot	No	Yes	None reported	Fully compliant	
Unilever	Yes (Paddle Pop promotion)	Yes	None reported	6 ads screened in children's programs	One complaint upheld
Total	6 companies marketed to children	5 companies did not report in this category	6 companies did not report in this category	9 companies breached the RCMI	2 complaints upheld; 6 dismissed

* Steps taken to meet the RCMI's requirements included changes to internal procedures for approving marketing material; auditing of media placement schedules; staff training and education; and dissemination of information to external agencies and media buyers (discussed further in Chapter 9).

** Some companies described how they targeted their marketing to adults, particularly for products consumed by children.

⁷⁵ Adapted from: Australian Food and Grocery Council, *Responsible Children's Marketing Initiative 2011 Compliance Report*, above n 59.

The AFGC purchases food and beverage advertising data to review signatories' marketing activities against the terms of the code. The AFGC makes the results of this monitoring publicly available in an annual 'Activity Report', the results of which I described in Chapter 4.⁷⁶ The AFGC will continue to purchase food and beverage television advertising data periodically to assess the activities of signatory and non-signatory companies against the RCMI's core principles and to measure the frequency of advertising during children's viewing periods.⁷⁷ The AFGC's 2010 and 2011 Activity Reports find that the RCMI is successful in reducing unhealthy food advertising directed to children.⁷⁸ However, Chapter 4 discussed significant flaws in the AFGC's evaluation, meaning that it captures only a small amount of the unhealthy food advertising that children see.⁷⁹ In particular, the AFGC's reports measure television advertising of unhealthy food that is 'directed primarily to children', according to either the rating of the program that an advertisement appears in, the program's creative content, or whether it has an audience share of 50 per cent or more children. In contrast, public health research evaluates the amount of unhealthy food advertising during children's peak viewing times, which represents children's exposure to unhealthy food advertising more accurately.

In addition to the Activity Report, the AFGC produces an annual 'Compliance Report' that summarises companies' annual reports, its own monitoring activities and any public complaints under the initiatives.⁸⁰ The 2010 and 2011 reports state that compliance with the initiatives was high during both years and that all signatory companies had put in place processes to implement the code's core principles.⁸¹ An audit of food and beverage advertising by the AFGC found that some signatories screened unhealthy food advertisements during children's programming. However, these instances of non-compliance were largely due to television networks awarding companies 'bonus' advertising slots that

⁷⁶ See Australian Food and Grocery Council, *Food and Beverage Advertising to Children: Activity Report* (2010), above n 20; Australian Food and Grocery Council, *Food and Beverage Advertising to Children: Activity Report* (2012), above n 22.

⁷⁷ Australian Food and Grocery Council, *Food and Beverage Advertising to Children: Activity Report* (2010), above n 20, 18.

⁷⁸ Australian Food and Grocery Council, *Food Adverts to Children Fall to Almost Zero* (8 May 2012) <<http://www.afgc.org.au/media-releases/1196-food-adverts-for-children-fall-to-almost-zero.html>>.

⁷⁹ See, e.g., Australian Communications and Media Authority, 'Industry Self-Regulation of Children's Food and Beverage Advertising: ACMA Monitoring Report', above n 32, 23-24.

⁸⁰ Australian Food and Grocery Council, *Responsible Children's Marketing Initiative 2010 Compliance Report*, above n 28; Australian Food and Grocery Council, *Responsible Children's Marketing Initiative 2011 Compliance Report*, above n 59; Australian Food and Grocery Council, *Australian Quick Service Restaurant Industry Initiative for Responsible Advertising and Marketing to Children 2011 Compliance Report*, above n 54.

⁸¹ Australian Food and Grocery Council, *Responsible Children's Marketing Initiative 2010 Compliance Report*, above n 28, 18; Australian Food and Grocery Council, *Responsible Children's Marketing Initiative 2011 Compliance Report*, above n 59, 21.

were not accounted for in companies' media buying schedules.⁸² Participants took steps to remedy this problem, including reclassification of advertisements and strengthening training programs for their media agencies.⁸³ In 2010 the ASB upheld three complaints for breaches of the RCMI,⁸⁴ and two in 2011.⁸⁵ The 2010 Compliance Report concludes that 'RCMI companies are fully committed to meeting their commitments to the RCMI and are demonstrating due diligence to reduce their marketing of HFSS [high fat, sugar, salt] foods to children aged less than 12 years'.⁸⁶ The 2011 reports on the RCMI and QSRI reach the same conclusion.⁸⁷

Although the AFGC reports high levels of compliance with the codes, independent research suggests otherwise.⁸⁸ One study measured compliance with the RCMI, QSRI and the *Children's Television Standards 2009* (CTS 2009) on free-to-air television in five main Australian cities.⁸⁹ It identified 332 breaches of the food industry initiatives during a two month period.⁹⁰ There were fewer breaches of the QSRI than the RCMI, partly because the former has fewer signatories and is less stringent than the latter.⁹¹ The study used broadcast scheduling data obtained from the Australian Communications and Media Authority (ACMA). It found discrepancies between this data and the results published the AFGC's 2010 Compliance Report.⁹² For example, Ferrero, Coca Cola and Kraft aired advertisements for unhealthy foods during C periods (in breach of the RMCI's requirements), despite reporting that they had not undertaken any promotions to children younger than 12 years of

⁸² Australian Food and Grocery Council, *Responsible Children's Marketing Initiative 2010 Compliance Report*, above n 28, 15; Australian Food and Grocery Council, *Responsible Children's Marketing Initiative 2011 Compliance Report*, above n 59, 16-18.

⁸³ Australian Food and Grocery Council, *Responsible Children's Marketing Initiative 2010 Compliance Report*, above n 28, 15; Australian Food and Grocery Council, *Responsible Children's Marketing Initiative 2011 Compliance Report*, above n 59, 16. See also the discussion in Chapter 9.

⁸⁴ Australian Food and Grocery Council, *Responsible Children's Marketing Initiative 2010 Compliance Report*, above n 28, 16-17.

⁸⁵ Australian Food and Grocery Council, *Responsible Children's Marketing Initiative 2011 Compliance Report*, above n 59, 19-21.

⁸⁶ Australian Food and Grocery Council, *Responsible Children's Marketing Initiative 2010 Compliance Report*, above n 28, 18.

⁸⁷ Australian Food and Grocery Council, *Australian Quick Service Restaurant Industry Initiative for Responsible Advertising and Marketing to Children 2011 Compliance Report*, above n 54, 10; Australian Food and Grocery Council, *Responsible Children's Marketing Initiative 2011 Compliance Report*, above n 59, 21.

⁸⁸ Michele Roberts et al, 'Compliance with Children's Television Food Advertising Regulations in Australia' (2012) 12(1) *BMC Public Health* 846.

⁸⁹ *Ibid.*

⁹⁰ *Ibid* 847.

⁹¹ *Ibid* 848.

⁹² *Ibid.*

age.⁹³ Simplot reported that it had occasionally (and inadvertently) aired a commercial for fish fingers during C periods.⁹⁴ However, the study identified a total of 139 repetitions of this advertisement during these times, indicating that the problem was more systemic than suggested by the company.⁹⁵ This research questions the credibility of company self-reports on compliance, underscoring the importance of independent monitoring in accordance with best practice principles for self-regulation. Yet at present, there is no framework for ongoing, independent monitoring of the RCMI and QSRI.⁹⁶

Food industry self-regulation should provide for a comprehensive, transparent and independent monitoring system.⁹⁷ WHO recommends that policy frameworks on food marketing to children include ‘a set of core process and outcome indicators, clearly defined roles and assignment of responsibility for monitoring and evaluation activities and mechanisms to parties that have no conflict of interest’.⁹⁸ Governments may need to establish monitoring frameworks and targets, as industry organisations tend to be narrow and selective in their reporting criteria.⁹⁹ Monitoring should be based on indicators that relate to the codes’ objectives, in addition to companies’ compliance with the scheme.¹⁰⁰ High levels of compliance do not necessarily indicate that regulation is reducing children’s exposure to unhealthy food advertising, because adherence to weak restrictions can result in little

⁹³ Ibid. See also Australian Food and Grocery Council, *Responsible Children's Marketing Initiative 2010 Compliance Report*, above n 28, 8.

⁹⁴ Australian Food and Grocery Council, *Responsible Children's Marketing Initiative 2010 Compliance Report*, above n 28, 11.

⁹⁵ Roberts et al, above n 88, 848.

⁹⁶ Lesley A King et al, 'Industry Self-Regulation of Television Food Advertising: Responsible or Responsive?' above n 73; Lesley King et al, 'Building the Case for Independent Monitoring of Food Advertising on Australian Television' (2012) (*FirstView Article*) *Public Health Nutrition* 1 <<http://journals.cambridge.org/action/displayAbstract?fromPage=online&aid=8706977>>; SA Health, 'Discussion Paper: Australian Children’s Exposure to the Advertising and Marketing of Energy-Dense, Nutrient-Poor Foods and Beverages: Strengthening Current Arrangements' (Government of South Australia, 9 May 2012) 16 <http://www.sahealth.sa.gov.au/wps/wcm/connect/879776804b29e174af00afe79043faf0/Food+marketing+seminar_9+May+2012_Discussion-paper.pdf?MOD=AJPERES&CACHEID=879776804b29e174af00afe79043faf0>.

⁹⁷ King et al, 'Building the Case for Independent Monitoring of Food Advertising on Australian Television', above n 96, 5; World Health Organisation, 'A Framework for Implementing the Set of Recommendations on the Marketing of Foods and Non-Alcoholic Beverages to Children' (World Health Organisation, 2012) 43 <http://www.who.int/dietphysicalactivity/framework_marketing_food_to_children/en/>.

⁹⁸ World Health Organisation, 'Set of Recommendations on the Marketing of Foods and Non-Alcoholic Beverages to Children', above n 23, 11.

⁹⁹ Lesley A King et al, 'Consultancy Report on Inappropriate Food Marketing to the National Preventative Taskforce' (Institute of Obesity, Nutrition and Exercise, The University of Sydney, 2009) 28 <<http://www.preventativehealth.org.au/internet/preventativehealth/publishing.nsf/Content/engagement-and-consultation-11p>>. See also World Health Organisation, 'A Framework for Implementing the Set of Recommendations on the Marketing of Foods and Non-Alcoholic Beverages to Children', above n 97, 40-45.

¹⁰⁰ Pan American Health Organisation, 'Recommendations from a Pan American Health Organisation Expert Consultation on the Marketing of Food and Non-Alcoholic Beverages to Children in the Americas' (World Health Organisation, 2011) 24.

significant change to advertising practices.¹⁰¹ Thus, indicators should be specific and measurable, and place demanding requirements on participants.¹⁰² They could include:¹⁰³

- The number of complaints received about non-compliance with the codes;
- The frequency of breaches and trends in this number over time;
- Steps taken by participants towards compliance;
- The frequency of unhealthy food advertising in key media and at times/locations when large numbers of children are likely to be exposed to it; and
- Content analysis of the messaging and persuasive techniques used in food advertising and the healthiness of advertised products.

Baseline data on the nature and volume of food advertising (prior to the codes' introduction) would also help to verify the claim that the initiatives have reduced the amount of food advertising directed to children.¹⁰⁴

A more transparent and accountable system would include broader governance arrangements.¹⁰⁵ For example, the 2012 review of the initiatives recommended that the AFGC establish a code administration committee comprising representatives from key stakeholder groups, including signatories, consumers and government. This committee would take charge of code development, monitoring and evaluation and would oversee the scheme's future direction.¹⁰⁶ Members would be given equal voting rights, creating an authentic partnership between industry and external parties.¹⁰⁷ Chapter 10 canvasses the idea of incorporating external stakeholders in the scheme's regulatory processes. For example the committee that manages the ABAC Scheme includes a representative from the federal Department of Health

¹⁰¹ Ibid.

¹⁰² Ibid. See also National Heart Forum, above n 12, 114; World Health Organisation 'A Framework for Implementing the Set of Recommendations on the Marketing of Foods and Non-Alcoholic Beverages to Children', above n 97, 43; Consumers International, 'Manual for Monitoring Food Marketing to Children' (Consumers International, September 2011) <<http://www.consumersinternational.org/media/795222/food-manual-english-web.pdf>>.

¹⁰³ King et al, 'Consultancy Report on Inappropriate Food Marketing to the National Preventative Taskforce', above n 99, 28. See also World Health Organisation, 'A Framework for Implementing the Set of Recommendations on the Marketing of Foods and Non-Alcoholic Beverages to Children', above n 97, 44-45.

¹⁰⁴ Lisa G Smithers, John W Lynch and Tracy Merlin, 'Television Marketing of Unhealthy Food and Beverages to Children in Australia: A Review of Published Evidence from 2009' (Australian National Preventive Health Agency, October 2012) 3 <<http://www.anpha.gov.au/internet/anpha/publishing.nsf/Content/publications>>.

¹⁰⁵ Tymms, above n 3, 63; SA Health, above n 96, 17.

¹⁰⁶ Tymms, above n 3, 63.

¹⁰⁷ Ibid 60.

and Ageing.¹⁰⁸ However, I question whether incorporating external representation into an industry-based scheme represents a meaningful form of public health governance, and whether it is likely to further public health objectives.

Chapter 11 describes government monitoring of the RCMI and QSRI. The ACMA oversaw the initiatives for a year, but decided not to continue with this activity after the establishment of ANPHA.¹⁰⁹ Chapter 4 introduced ANPHA's role in monitoring and evaluating the RCMI and QSRI. In May 2012, ANPHA held a seminar on unhealthy food advertising to children, attended by government, industry and public health representatives.¹¹⁰ The seminar established an government-industry working group (the National Working Group on Food Marketing to Children), to develop a framework for the regular and independent monitoring of food marketing to children.¹¹¹ In early 2013, ANPHA released two proposals on the structure of this framework.¹¹² Depending on the results of ANPHA's activities, the AFGC will 'consider' establishing an independent code administration committee or steering group, as recommended by the independent review.¹¹³ However, it rejected another recommendation that it engage an independent organisation to compile the codes' annual compliance report.¹¹⁴ According to the AFGC, an independent organisation would not produce a substantially different report and would be costly.¹¹⁵ Thus, at the time of writing arrangements for independent administration and monitoring of the codes remain in flux.

3. Complaints mechanism

Complaints from the public trigger enforcement processes attached to advertising codes of conduct. Thus, it is crucial that codes provide a fast, easily accessible complaints handling

¹⁰⁸ See The ABAC Scheme Limited, *The ABAC Scheme: Rules and Procedures* (5 December 2012) cl 1.1 <<http://www.abac.org.au/publications/rules-procedures/>>; Management Committee of the ABAC Scheme, *The ABAC Scheme Annual Report 2011* (2011) 2 The ABAC Scheme <<http://www.abac.org.au/publications/annual-reports/>>.

¹⁰⁹ See Australian Communications and Media Authority, 'Industry Self-Regulation of Children's Food Beverage Advertising: ACMA Monitoring Report', above n 32, 37.

¹¹⁰ See SA Health, above n 96; Australian National Preventive Health Agency, *Communiqué: National Seminar on Food Advertising and Marketing to Children* (2012) ANPHA, SA Health <<http://anpha.gov.au/internet/anpha/publishing.nsf/Content/news-20120524/>>.

¹¹¹ Australian National Preventive Health Agency, *Communiqué: National Seminar on Food Advertising and Marketing to Children*, above n 110.

¹¹² These frameworks are discussed further in Chapter 11.

¹¹³ Australian Food and Grocery Council, *Position Statement in Response to: Responsible Advertising to Children: An Independent Review of the Australian Food and Beverage Industry Self-Regulatory Codes* (1 November 2012) 9 Australian Food and Grocery Council <<http://www.afgc.org.au/industry-codes/advertising-to-children/rcmi/rcmi-reports-2009.html>>.

¹¹⁴ *Ibid* 11-12.

¹¹⁵ *Ibid* 12.

mechanism.¹¹⁶ Public complaints may be directed to companies or trade associations in the first instance. However, an independent body should be made available for complaints resolution in the event that consumers are unhappy with the industry's response.¹¹⁷ An effective complaints mechanism enhances consumer confidence in the scheme and enables industry to identify and remedy systemic problems with its operation.¹¹⁸ The provision of an independent complaints handling body is important so that 'justice is seen to be done' as well as actually being done. Industry associations exist to benefit member companies, meaning that the public may not perceive them as an acceptable independent body to review complaints.¹¹⁹ The publication of complaint determinations also enhances the transparency and credibility of the system.¹²⁰

Public complaints under the RCMI and QSRI

The RCMI and QSRI allow for complaints about non-compliance to be laid with the Advertising Standards Board (ASB).¹²¹ An independent arbiter makes the determination of whether the product represents a healthy choice (according to criteria nominated by participants to the RCMI, or according to the nutritional profile model attached to the QSRI) while the ASB determines whether the advertisement is directed primarily to children.¹²² The ASB publishes reports of its determinations on the Advertising Standards Bureau's website (the ASB's secretariat arm).¹²³ The ASB's independence from industry and its representative membership is consistent with the goal of public participation in self-regulatory schemes, like that of the food industry.¹²⁴ The idea of community standards in advertising guides the ASB's decisions; thus it explicitly claims to operate as the public's voice in the complaints-hearing process.¹²⁵ The independent reviewer found that the use of the ASB to hear complaints about

¹¹⁶ Directorate-General for Health and Consumer Protection, above n 2, 20; Australian Competition and Consumer Commission, above n 6, 9-1; European Advertising Standards Alliance, above n 14, 25; Harker, above n 48, 101-102.

¹¹⁷ Australian Competition and Consumer Commission, above n 6, 9-10.

¹¹⁸ Taskforce on Industry Self-Regulation, above n 12, 73.

¹¹⁹ Ibid 61; Australian Competition and Consumer Commission, above n 6, 10.

¹²⁰ Directorate-General for Health and Consumer Protection, above n 2, 21.

¹²¹ Australian Food and Grocery Council, *Responsible Children's Marketing Initiative*, above n 16, 3; Australian Quick Service Restaurant Industry, above n 17, 3.

¹²² The independent arbiter is the Nutritional Physiology Research Centre at the University of South Australia. See Australian Food and Grocery Council, *Responsible Children's Marketing Initiative 2010 Compliance Report*, above n 28, 6.

¹²³ See The Advertising Standards Bureau, *Advertising Standards Determinations* (undated) <<http://www.adstandards.com.au/casereports/determinations>>.

¹²⁴ See Directorate-General for Health and Consumer Protection, above n 2, 26.

¹²⁵ Advertising Standards Bureau, Submission No 27 to the House of Representatives Standing Committee on Social Policy and Legal Affairs, *Inquiry into the Regulation of Billboard and Outdoor Advertising*, 18 February 2010, 12

food advertising was a strong aspect of the food industry's voluntary scheme, and met criteria for best practice models of complaint resolution.¹²⁶ In contrast, members to the EU Pledge accept similar restrictions on advertising unhealthy food to children, but this industry initiative appears not to accept consumer complaints.¹²⁷

However, the complexity of advertising self-regulation undermines the role of the complaints mechanism in providing for public input on the Australian scheme's operation.¹²⁸ The RCMI and QSRI operate within a broader advertising regulatory system that is technical and confusing.¹²⁹ In addition to the food industry initiatives, the ASB hears complaints under codes developed by the advertising industry, some of which impact on food advertising to children.¹³⁰ Each code contains different terms and conditions, and applies to different advertisers and products, media, and age groups of children.¹³¹ Variations between individual company action plans add an additional layer of complexity to the system.¹³² As a result, it is difficult to identify instances of non-compliance, the correct code to complain under and whether a complaint is warranted.¹³³ Further, the ASB may refuse to consider a complaint about an advertisement that is no longer running, or where it has already considered a complaint about the same advertisement.¹³⁴ The complaint handling process deters the public from complaining about breaches of the codes, particularly given the time, money and expertise required to do so.¹³⁵ Accordingly, the number of complaints the ASB receives may not truly reflect the level of consumer concern about food advertising to children, nor does it provide an accurate measure of participants' compliance.

<http://www.aph.gov.au/parliamentary_business/committees/house_of_representatives_committees?url=spla/outdoor%20advertising/subs.htm>.

¹²⁶ Tymms, above n 3, 61.

¹²⁷ Ibid. See EU Pledge, *Home* (2013) <<http://www.eu-pledge.eu/>>.

¹²⁸ King et al, 'Consultancy Report on Inappropriate Food Marketing to the National Preventative Taskforce', above n 99, 28.

¹²⁹ J Lumley, J Martin and N Antonopoulos, 'Exposing the Charade: The Failure to Protect Children from Unhealthy Food Advertising' (Obesity Policy Coalition, 2012) 15

<<http://www.opc.org.au/paper.aspx?ID=exposing-the-charade&Type=policydocuments>>.

¹³⁰ The advertising industry codes were described in Chapter 2. See Australian Association of National Advertisers, *AANA Code for Marketing and Advertising Communications to Children* (May 2008) <<http://www.aana.com.au/pages/aana-code-for-advertising-marketing-communications-to-children.html>>; Australian Association of National Advertisers, *AANA Food and Beverages Advertising and Marketing Communications Code* (August 2009)

<<http://www.aana.com.au/data/Documents/Codes/AANAFoodandBeveragesCodeAugust2009.pdf>>/.

¹³¹ Lumley, Martin and Antonopoulos, above n 129, 15.

¹³² Hebden et al, 'Industry Self-Regulation of Food Marketing to Children: Reading the Fine Print', above n 77, 234.

¹³³ Ibid; SA Health, above n 96, 14-15; Lumley, Martin and Antonopoulos, above n 129, 15.

¹³⁴ SA Health, above n 96, 16.

¹³⁵ Elizabeth Handsley et al, 'Media, Public Health and Law: A Lawyer's Primer on the Food Advertising Debate' (2007) 12 *Media and Arts Law Review* 87, 96.

The complaints hearing process might be improved by creating an independent panel to hear alleged breaches of the RCMI and QSRI.¹³⁶ This panel could be similar to the ABAC Adjudication Panel, which hears complaints about alcohol advertising under the ABAC.¹³⁷ The Panel includes a public health representative along with experts in marketing and media and a Chairperson with a legal background.¹³⁸ As I will discuss in Chapter 10, alcohol policy researchers question whether the panel is truly independent from the alcohol industry, casting doubt on the quality of its decision-making.¹³⁹ However, a complaints panel including equal representation from external interests (such as consumer affairs and parent groups) could provide for a robust complaints hearing mechanism.¹⁴⁰ Other options might be for public complaints to be made to a consumer ombudsman, as is found under the Swedish *Radio and Television Act 1996*,¹⁴¹ or to an independent body that manages both monitoring and enforcement of the food industry's initiatives.¹⁴²

4. Enforcement

Self-regulation should contain incentives for company compliance, including penalties to deter non-compliance, and rewards for good behaviour.¹⁴³ Providing for a wide range of sanctions enables enforcement action to be tailored to the seriousness of the breach,¹⁴⁴ including persuasion, warnings, fines, expulsion from the scheme or ejection from the industry association as a measure of last resort.¹⁴⁵ Voluntary schemes tend to rely on informal sanctions and peer pressure for their enforcement, i.e., using negative publicity to 'name and shame' non-compliant companies into raising their standards.¹⁴⁶ However, research suggests that self-regulation requires external sanctions to deter companies from 'free-riding' on other

¹³⁶ Ibid 17.

¹³⁷ The ABAC Scheme Limited, *The ABAC Scheme: Rules and Procedures*, above n 108, cl 2.4.

¹³⁸ Ibid. See also the discussion of the ABAC Scheme in Chapter 2.

¹³⁹ See, e.g., Robert J Donovan, Lynda Fielder and Geoffrey Jalleh, 'Alcohol Advertising Advocacy Research No Match for Corporate Dollars: The Case of Bundy R Bear' (2011) 20 *Journal of Research for Consumers* 1.

¹⁴⁰ SA Health, above n 96, 17.

¹⁴¹ *Radio and Television Act 1996*: 844 (Sweden) ch 9 s 2, cited in World Health Organisation, 'A Framework for Implementing the Set of Recommendations on the Marketing of Foods and Non-Alcoholic Beverages to Children', above n 97, 36.

¹⁴² Pan American Health Organisation, above n 100, 15.

¹⁴³ Directorate-General for Health and Consumer Protection, above n 2, 22; Department of Finance and Treasury, above n 5, 28. See also Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Regulation Debate* (Oxford University Press, 1992).

¹⁴⁴ Taskforce on Industry Self-Regulation, above n 12, 61.

¹⁴⁵ Department of Finance and Treasury, above n 5, 28; Australian Competition and Consumer Commission, above n 6, 11.

¹⁴⁶ Purchase, above n 52, 89. See also Brent Fisse and John Braithwaite, *The Impact of Publicity on Corporate Offenders* (State University of New York Press, 1983); John Braithwaite, *Crime, Shame and Reintegration* (Cambridge University Press, 1989).

members' compliance with the scheme.¹⁴⁷ Enforcement action should be supported by promotional and educational activities that raise the profile of self-regulation with both the public and the industry concerned.¹⁴⁸ Information on the codes should be made widely available to the public, including the main code document, a list of signatories and procedures for laying complaints.¹⁴⁹ Disseminating information about the scheme enhances consumer understanding of self-regulation and their participation in regulatory processes, for example by laying complaints.¹⁵⁰ It also helps pledge participants to understand their obligations and the consequences of failing to abide by the code.¹⁵¹ Further, the public disclosure of disciplinary action allows for 'naming and shaming' action to work effectively, and enables the development of precedent on unacceptable forms of advertising.¹⁵²

Enforcing food industry self-regulation

The RCMI and QSRI state that '[s]anctions may be imposed on participants who fail to meet their obligations under the terms of this initiative'.¹⁵³ However, they do not specify what sanctions will be applied to non-compliant companies, nor is there any evidence that the AFGC has penalised signatories that breach the codes, despite identifying a number of non-compliant advertisements. The main route for enforcement seems to be the complaints handling mechanism provided by the ASB. If the ASB decides that an advertisement breaches the initiatives, it can order the withdrawal or modification of the advertisement. However it has no means of enforcing this order, nor can it award financial penalties for breaches.¹⁵⁴ If the advertiser does not withdraw or modify the advertisement, the ASB may refer the case to the appropriate government agency, comment on the advertiser's lack of response in its determination or forward it to media proprietors.¹⁵⁵ The advertising industry argues that withdrawal or modification of campaigns has significant reputational and

¹⁴⁷ See, e.g., Andrew King and Michael Lenox, 'Industry Self-Regulation without Sanctions: The Chemical Industry's Responsible Care Program' (2000) 43(4) *The Academy of Management Journal* 698.

¹⁴⁸ Australian Competition and Consumer Commission, above n 6, 11; European Advertising Standards Alliance, above n 14, 25.

¹⁴⁹ *Ibid.*

¹⁵⁰ Taskforce on Industry Self-Regulation, above n 12, 60; Harker, above n 48, 635.

¹⁵¹ Taskforce on Industry Self-Regulation, above n 12, 60.

¹⁵² Harker, above n 48, 635.

¹⁵³ Australian Food and Grocery Council, *Responsible Children's Marketing Initiative*, above n 16, 3; Australian Quick Service Restaurant Industry, above n 17, 5.3.

¹⁵⁴ See Australian Association of National Advertisers, *Australian Association of National Advertisers Code of Ethics* (2009) 3 <http://www.aana.com.au/advertiser_ethics_code.html>. See also Australian Communications and Media Authority, 'Industry Self-Regulation of Children's Food and Beverage Advertising: ACMA Monitoring Report', above n 32, 30; Lumley, Martin and Antonopoulos, above n 129, 18.

¹⁵⁵ Advertising Standards Bureau, Submission to *Inquiry into the Regulation of Billboard and Outdoor Advertising*, above n 125, 10.

financial implications for companies and thus encourages compliance.¹⁵⁶ Yet this sanction is often applied by the ASB after a campaign is finished, when exposure to the advertisement cannot be prevented.¹⁵⁷ Accordingly, it provides little incentive to ensure that an advertisement is compliant before it is broadcast or published.¹⁵⁸ Further, there is no evidence of the ASB using more punitive measures in response to breaches.

Australian food industry self-regulation largely relies upon soft sanctions for its enforcement, i.e. companies being ‘named and shamed’ by having a complaint upheld and the ASB’s decision made public.¹⁵⁹ Negative publicity may be an effective sanction, given that RCMI and QSRI signatories are all large, high profile companies with a significant economic investment in their brands. Supporting this position is the fact that there are very high levels of compliance with the ASB’s determinations.¹⁶⁰ Nevertheless, it appears that some participants fail to take the ASB’s rulings seriously.¹⁶¹ In 2009, the ASB held that Hungry Jack’s breached the QSRI by advertising a Kids Club Meal that did not meet the initiative’s nutritional criteria.¹⁶² Soon after, Hungry Jack’s ran another advertisement for the same meal, featuring characters from the television show *The Simpsons*.¹⁶³ In the second case (also upheld by the ASB), Hungry Jack’s said that it was aware that the meal did not meet the criteria, but that it did not have a compliant children’s meal available for promotion.¹⁶⁴ This suggests that the ASB’s determinations do not sufficiently deter companies from (knowingly) running non-compliant campaigns.

As the food industry’s scheme matures, it is unlikely to become effective without more punitive sanctions. If the AFGC strengthens the codes’ standards, then companies are more likely to weigh up the benefits of compliance against the impact on their profit margins.¹⁶⁵

¹⁵⁶ Directorate-General for Health and Consumer Protection, above n 2, 22-23; European Advertising Standards Alliance, above n 14, 9; SA Health, above n 96, 16.

¹⁵⁷ SA Health, above n 96, 16; Lumley, Martin and Antonopoulos, above n 129, 18.

¹⁵⁸ Ibid.

¹⁵⁹ Directorate-General for Health and Consumer Protection, above n 2, 22-23; European Advertising Standards Alliance, above n 14, 25.

¹⁶⁰ Advertising Standards Bureau, Submission to *Inquiry into the Regulation of Billboard and Outdoor Advertising*, above n 125, 10.

¹⁶¹ Lumley, Martin and Antonopoulos, above n 129, 18.

¹⁶² Advertising Standards Bureau, *Case Report 573/09* (9 December 2009)

<<http://www.adstandards.com.au/casereports/determinations>>, cited in Lumley, Martin and Antonopoulos, above n 129, 18.

¹⁶³ Advertising Standards Bureau, *Case Report 32/10* (10 February 2010)

<<http://www.adstandards.com.au/casereports/determinations>>, cited in Lumley, Martin and Antonopoulos, above n 129, 18.

¹⁶⁴ Ibid 4.

¹⁶⁵ Tymms, above n 3, 62

Yet if the scheme attracts smaller, less publicly visible companies, food industry self-regulation also risks developing a ‘free-rider’ problem.¹⁶⁶ Thus, the independent review recommended that the AGFC provide incentives for compliance (potentially set by government) as well as commercially significant sanctions for breaches.¹⁶⁷ The latter would lend ‘softer’ enforcement options (such as negative publicity) greater weight, as the AFGC could legitimately threaten companies with more punitive options if they failed to comply with the codes.¹⁶⁸ The AFGC responded to the independent review by saying that it supported the idea of incentives to encourage compliance, but it could not issue financial penalties.¹⁶⁹ However, it noted its power to rescind companies’ membership of the organisation, as well as the ASB’s ability to require corrective advertising from companies in breach of the initiatives.¹⁷⁰ Together with the censuring effect of the ASB’s determinations, the AFGC claimed that these measures comprised sufficient penalties for non-compliance.¹⁷¹

Another way of preventing non-compliance would be to require pre-clearance of food advertising, similar to alcohol advertising.¹⁷² Chapter 2 described how the ABAC Scheme requires pre-vetting for alcohol advertising in some media, with requirements differing for the beer, wine and spirits sectors.¹⁷³ An adjudicator evaluates advertising material against the ABAC, the AANA *Code of Ethics* and prevailing community standards on advertising.¹⁷⁴ He or she may recommend against the advertisement being published or broadcast, or that it is modified to meet required regulatory standards.¹⁷⁵ Pre-vetting reduces the number of complaints and provides a higher level of public protection from exposure to non-compliant advertisements.¹⁷⁶ The significant costs involved in withdrawing or modifying offending

¹⁶⁶ Gunningham and Rees, above n 44, 396.

¹⁶⁷ Tymms, above n 3, 61-62.

¹⁶⁸ See Ayres and Braithwaite, above n 143.

¹⁶⁹ Australian Food and Grocery Council, *Position Statement in Response to: Responsible Advertising to Children: An Independent Review of the Australian Food and Beverage Industry Self-Regulatory Codes*, above n 113, 12.

¹⁷⁰ *Ibid.*

¹⁷¹ *Ibid.*

¹⁷² The ABAC Scheme Limited, *The ABAC Scheme: Rules and Procedures*, above n 108, cl, 5.0. See also Directorate-General for Health and Consumer Protection, above n 2, 18-19.

¹⁷³ *Ibid.*

¹⁷⁴ Drugs and Crime Prevention Committee, Parliament of Victoria, ‘Inquiry into Strategies to Reduce Harmful Alcohol Consumption Final Report’ (March 2006) vol 1, 104
<http://www.parliament.vic.gov.au/images/stories/committees/dcpc/alcoholharmreduction/DCPC-Report_Alcohol_Vol1_2006-03.pdf>.

¹⁷⁵ *Ibid.*

¹⁷⁶ National Committee for the Review of Alcohol Advertising, above n 34, 36-37. See also World Health Organisation, ‘A Framework for Implementing the Set of Recommendations on the Marketing of Foods and Non-Alcoholic Beverages to Children’, above n 97, 35.

advertisements may deter advertisers from developing campaigns that breach regulation.¹⁷⁷ Pre-vetting food advertising could be more complex than alcohol advertising (given the diverse array of food and non-alcohol beverage products), but it would lessen children's exposure to unhealthy food advertising.¹⁷⁸ Alternatively, the AFGC or Advertising Standards Bureau could provide non-binding copy advice on an advertisement's compliance with the RCMI or QSRI, prior to its broadcast or publication.¹⁷⁹ However, this may not be practical given the large volume of food advertising broadcast on television, and the resources that would be required to provide advice on each campaign.

Disseminating information about food industry self-regulation

The food industry scheme contains a number of mechanisms for disclosing information about the codes' operation, and for opening up the system to external scrutiny. Information disclosure systems include participants' annual reports, the AFGC's monitoring activities and its annual compliance report. With the exception of companies' annual reports, the AFGC makes these documents available on its website.¹⁸⁰ The public disclosure of the ASB's determinations provides self-regulation with a measure of transparency, and allows for scrutiny of its interpretation of the codes. There is also a greater level of transparency than found in relation to other voluntary advertising codes. For example, the ABAC Scheme makes publicly available annual reports on its operation, as well as the complaint determinations from the ABAC Adjudication Panel.¹⁸¹ However, unlike the RCMI and QSRI it does not require participants to self-report on compliance and to release the results to the public.

The food industry publicises the self-regulatory scheme to a limited extent. The ACMA performed an audit of RCMI signatories' websites and found that very few provided easily

¹⁷⁷ Standing Committee on Community Affairs, Parliament of Australia, *Alcohol Toll Reduction Bill 2007* [2008] (June 2008) 15

<http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=s602>.

¹⁷⁸ The Spanish advertising self-regulatory system provides for pre-copy advice on compliance with the code on marketing to children, and other relevant regulation. See World Health Organisation, 'A Framework for Implementing the Set of Recommendations on the Marketing of Foods and Non-Alcoholic Beverages to Children', above n 97, 36; M Mar Romero-Fernández, Miguel Ángel Royo-Bordonada and Fernando Rodríguez-Artalejo, 'Compliance with Self-Regulation of Television Food and Beverage Advertising Aimed at Children in Spain' (2009) 13(7) *Public Health Nutrition* 1013, 1014.

¹⁷⁹ See Directorate-General for Health and Consumer Protection, above n 2, 18; European Advertising Standards Alliance, above n 14, 11.

¹⁸⁰ See Australian Food and Grocery Council, *The Responsible Children's Marketing Initiative* (2010) <<http://www.afgc.org.au/industry-codes/advertising-to-children/rcmi.html>>; Australian Food and Grocery Council, *QSR Initiative for Responsible Advertising and Marketing to Children* (2010) <<http://www.afgc.org.au/industry-codes/advertising-to-children/qsr-initiative.html>>.

¹⁸¹ The ABAC Scheme Limited, *ABAC Publications* (2013) <<http://www.abac.org.au/publications/>>.

accessible links to their company action plans, or to the terms of the initiative.¹⁸² Further, it is not easy to find documents relating to the RCMI and QSRI on the AFGC's website. These barriers to acquiring information about the codes add to the difficulties consumers face in laying complaints with the ASB, particularly considering the scheme's complexity.¹⁸³ The AFGC could encourage compliance by giving greater publicity to the scheme, including to instances of non-compliance and good behaviour.¹⁸⁴ However, Chapter 8 discusses the fact that most consumers are not aware of the scheme, and would be unlikely to purchase products from companies that participate in self-regulation, even if the codes were heavily publicised. Accordingly, there is little potential for further consumer influence over self-regulation, as mediated through market mechanisms.¹⁸⁵

5. Reviewing the operation of self-regulation

The terms of voluntary codes should provide for structured, regular reviews of the system's operation.¹⁸⁶ The review framework should include the baseline data that will be collected to judge effectiveness, performance indicators that can be used to measure success, and timeframes for evaluation.¹⁸⁷ Periodic review ensures that regulation is meeting its objectives and is still appropriate to the public purpose it seeks to address.¹⁸⁸ It encourages continuous improvement and revisions to the codes' terms that reflect the needs and concerns of affected parties.¹⁸⁹ It can be difficult to identify which organisations should review or audit self-regulation.¹⁹⁰ Industry actors tend not to trust NGOs to objectively evaluate corporate performance.¹⁹¹ Rather, their preferred option is auditing by professional third-party bodies, such as the Australian Standards Association.¹⁹² However, an independent body comprising a wide range of stakeholders enhances the credibility and transparency of review procedures.¹⁹³

¹⁸² Australian Communications and Media Authority, 'Industry Self-Regulation of Children's Food and Beverage Advertising: ACMA Monitoring Report', above n 32, 28.

¹⁸³ Ibid.

¹⁸⁴ See, e.g., Karen Yeung, 'Government by Publicity Management: Sunlight or Spin?' (2005) 2 *Public Law* 360.

¹⁸⁵ See John Braithwaite, *Regulatory Capitalism: How It Works, Ideas for Making It Work Better* (Edward Elgar, 2008) 95.

¹⁸⁶ Sharma, Teret and Brownell, above n 2, 24; Department of Finance and Treasury, above n 5, 27; Government of Canada, above n 12, 16.

¹⁸⁷ Department of Finance and Treasury, above n 5, 27.

¹⁸⁸ Australian Competition and Consumer Commission, above n 6, 13; Government of Canada, above n 12, 16.

¹⁸⁹ Government of Canada, above n 12, 24.

¹⁹⁰ Organisation for Economic Co-Operation and Development, above n 8, 78; Gunningham and Rees, above n 44, 384-385.

¹⁹¹ Haufler, above n 13, 72-74.

¹⁹² Ibid.

¹⁹³ Ibid. See also Gunningham, above n 5, 72-74; National Heart Forum, above n 12, 111.

Review of the RCMI and QSRI

The quick service restaurant industry contracted the Healthy Kids Association (HKA) to monitor the impact of the QSRI over the 12 months from its commencement.¹⁹⁴ The HKA is a non-government, not-for-profit health promotion organisation. Its main role is to assist NSW schools to implement government policies on the provision of healthy foods in school canteens.¹⁹⁵ It is also a critic of food industry marketing to children; therefore, it is commendable that the industry engaged the HKA to undertake the review. Equally, it was a brave decision for the HKA to accept this position, as it risked its reputation as an independent advocate through its association with the food industry.

The HKA reviewed signatories' marketing activities against the QSRI during two auditing periods in 2010 and 2011, using information provided by signatory companies.¹⁹⁶ Its final report found that the majority of advertising complied with the QSRI and that there had been decreases in the use of popular personalities to endorse products.¹⁹⁷ However, it also identified ten non-compliant advertisements across the two auditing periods.¹⁹⁸ The HKA recommended improvements to the QSRI, including updating the initiative's definitions to align them with other advertising regulatory instruments.¹⁹⁹ The AFGC responded to the report by speaking with non-compliant companies, who gave undertakings to modify their marketing practices.²⁰⁰ The AFGC also agreed to strengthen the terms of the initiative in accordance with the HKA's recommendations.²⁰¹ The HKA will not continue to review the QSRI; from 2011 the AFGC conducted 'in-house' monitoring of the initiative.²⁰² This aligns the administrative arrangements for the RCMI and QSRI, but it also removes one source of external scrutiny of the QSRI's operation.

¹⁹⁴ See Healthy Kids Association, *Final Report on the Compliance of Signatories to the Australian Quick Service Restaurant Industry Initiative for Responsible Advertising to Children*, above n 3; Australian Quick Service Restaurant Industry, above n 17, 3.

¹⁹⁵ Healthy Kids Association, *History of HKA* (undated) <<https://healthy-kids.com.au/category/85/history>>.

¹⁹⁶ Healthy Kids Association, *Final Report on the Compliance of Signatories to the Australian Quick Service Restaurant Industry Initiative for Responsible Advertising to Children*, above n 3, 7-8.

¹⁹⁷ *Ibid* 9.

¹⁹⁸ *Ibid*.

¹⁹⁹ *Ibid* 19.

²⁰⁰ Australian Food and Grocery Council, *Response: In Response To: Healthy Kids Association Incorporated - Final Report on the Compliance of Signatories to the Australian Quick Service Restaurant Industry Initiative for Responsible Advertising to Children* (9 January 2012) 4 <<http://www.afgc.org.au/tools-guides-.html>>.

²⁰¹ *Ibid* 5.

²⁰² Australian Food and Grocery Council, *Australian Quick Service Restaurant Industry Initiative for Responsible Advertising and Marketing to Children 2011 Compliance Report*, above n 58, 5.

The AFGC commissioned an independent review of the RCMI and QSRI in 2012.²⁰³ The AFGC contracted Susannah Tymms, a consultant, to assess the operation of the initiatives and to provide recommendations for enhancing the voluntary program. The review did not measure compliance, nor the effect of the initiatives on children's exposure to unhealthy food advertising.²⁰⁴ Rather, the key question for the review was: '[d]o the advertising to children initiatives have the attributes of well-run and effective self-regulatory codes?'²⁰⁵ The review's methodology involved interviews with representatives of RCMI and QSRI participants, as well as the AFGC and ASB.²⁰⁶ The AFGC developed a supplementary questionnaire that it sent to signatory companies, which asked how they implemented the codes, whether the ASB's complaints mechanism was adequate and their opinion of the AFGC's administration of the scheme.²⁰⁷

The independent reviewer released her report in early 2013.²⁰⁸ Tymms recommended a series of improvements to the terms of the initiatives, as well as strengthening the administration, monitoring and enforcement processes attached to the codes. Many of her suggestions are incorporated into this thesis and will not be restated here. However, one of the review's main aims was to increase the clarity of the codes and to make them consistent with other forms of Australian advertising regulation, as well as international best practice in food advertising self-regulation. For example, the report suggested that the terms and conditions of the RCMI and QSRI be aligned with those of the CTS 2009, particularly in relation to premium offers.²⁰⁹ It also recommended that the industry work towards establishing a set of universal nutrition criteria that RCMI signatories could use to identify healthier choice products that can be advertised to children.²¹⁰ A similar revision was made to the most prominent food US advertising pledge, the *Children's Food and Beverage Advertising Initiative*.²¹¹ The AFGC

²⁰³ Australian Food and Grocery Council, *Responsible Children's Marketing Initiative 2011 Compliance Report*, above n 54, 22.

²⁰⁴ Ibid.

²⁰⁵ Ibid.

²⁰⁶ Tymms, above n 3, 33

²⁰⁷ Ibid.

²⁰⁸ Ibid.

²⁰⁹ Ibid 56-57.

²¹⁰ Ibid 59.

²¹¹ See Elaine D Kolish and Magdalena Hernandez, 'The Children's Food and Beverage Advertising Initiative: A Report on Compliance and Progress During 2011' (Council of Better Business Bureaus, 2012) 7 <<http://www.bbb.org/us/childrens-food-and-beverage-advertising-initiative/>>.

responded positively to the majority of the review's recommendations and plans to have a revised version of the RCMI in effect by January 2014.²¹²

It is commendable that the AFGC undertook an independent review of the scheme, and that it is committed to acting on the reviewer's recommendations. A critical next step is for the AFGC to seek periodic review of the scheme on an on-going basis, for example every three years.²¹³ As recommended by WHO, processes of review should include a system to evaluate the impact and effectiveness of self-regulation against its overall objective, using a set of clearly defined indicators.²¹⁴ In other words, the review should report on both regulatory processes and outcomes, unlike the 2012 audit which focused on the design and implementation of the scheme.²¹⁵ The AFGC also seems to have had a significant degree of control over the design of the 2012 review. A stronger process would incorporate external interested parties and allow them full control over the terms and conditions of the evaluation. For example, contracting a public health organisation to undertake the next review might address the criticism that self-regulation is largely window dressing. A truly independent, external review would provide another mechanism for fostering the scheme's accountability and making it more responsive to external stakeholder concerns.

6. Conclusion

The terms of the RCMI and QSRI do not meet criteria for the effective design and implementation of self-regulation. The codes lack clear goals and targets, independent administration, systematic and objective monitoring, meaningful sanctions for non-compliance and on-going external review.²¹⁶ Public health advocates question the credibility of the food industry initiatives, and this is hardly surprising given that the codes fail to meet best practice principles for effective self-regulation. Further, regulatory processes are relatively ad hoc and have evolved over time. The developing nature of the scheme impacts upon its transparency: the main code documents do not always specify who is responsible for administration and enforcement, and information on these functions is spread across a range of documents.

²¹² See Australian Food and Grocery Council, *Position Statement in Response to: Responsible Advertising to Children: An Independent Review of the Australian Food and Beverage Industry Self-Regulatory Codes*, above n 113.

²¹³ Tymms, above n 3, 30.

²¹⁴ World Health Organisation, 'Set of Recommendations on the Marketing of Foods and Non-Alcoholic Beverages to Children', above n 23, 12.

²¹⁵ Tymms, above n 3, 30.

²¹⁶ See also Sharma, Teret and Brownell, above n 2, 242.

The changing nature of the regulatory framework does not necessarily mean that it is a sham. One of the benefits of self-regulation is its flexibility and ability to be improved over time.²¹⁷ However, the extent to which the scheme develops more robust administrative processes depends upon the food industry's willingness to respond to criticism. The AFGC states that it is 'committed to further developing and strengthening these industry codes to address community concerns about the nature and extent of food and beverage advertising to children'.²¹⁸ Its intention revise the terms of the QSRI and RCMI supports this statement.²¹⁹ However, to produce a truly effective self-regulatory system, the AFGC will need to consider broad ranging changes to how the scheme is administered, enforced and reviewed. Table 18 provides a summary of recommendations for improvements to the self-regulatory processes established by the codes.

²¹⁷ Government of Canada, above n 12, 4. Chapter 8 also discusses this point, and how the standards contained in the RCMI and QSRI might be strengthened to improve food industry advertising practices.

²¹⁸ Australian Communications and Media Authority, 'Industry Self-Regulation of Children's Food and Beverage Advertising: ACMA Monitoring Report', above n 32, 28.

²¹⁹ See Australian Food and Grocery Council, *Position Statement in Response to: Responsible Advertising to Children: An Independent Review of the Australian Food and Beverage Industry Self-Regulatory Codes*, above n 113.

Table 18. Recommendations for improving the self-regulatory framework established by the RCMI and QSRI

Scheme Aspect	Recommendation
Objectives	Objectives based on reducing children’s exposure to unhealthy food advertising and measurable targets related to this objective.
Administration	Administration by an independent body including government, consumer and public health representation. The codes should specify the body’s functions and responsibilities, including monitoring, oversight and enforcement.
Monitoring	A framework for regular and systematic monitoring by an independent third party across all media, including the collection of data related to objectives set out in the codes.
Complaints handling	Complaints could be heard by the independent administrative body, or a separate panel comprising equal representation from parties external to industry.
Enforcement	A range of sanctions for non-compliance and incentives/rewards for good behaviour. Copy advice or pre-clearance may prevent children from viewing unhealthy food advertising. Greater publicity given to the scheme, including by pledge participants.
Review	The AFGC should commit to ongoing, independent review of the scheme, using processes that incorporate external stakeholders.

Another important finding is that the food industry adopted the codes with very little consultation with external stakeholders. Excluding external stakeholders from the development and administration of the initiatives provides support for the public health argument that the RCMI and QSRI largely reflect the food industry’s interests, rather than those of consumers and public health advocates. In other words, the industry’s intention was to appease community concerns, rather than to meaningfully address them. Without some form of external involvement in the development and administration of the RCMI and QSRI, self-regulation fails to address the concerns of key stakeholder groups and these groups are unlikely to view the initiatives as a credible source of governance.²²⁰ It is also more likely that the food industry will continue to face criticism and the threat of further government regulation remains a possibility.

A more fundamental problem is that food industry self-regulation is presented as an alternative to government regulation, yet the public appears not to have a meaningful voice in how this private regulatory system is run.²²¹ In these circumstances, if government is reluctant to impose its own regime, consideration should be given to how the public interest could be more strongly incorporated into the voluntary codes, and to ensuring that a wide range of stakeholders have an opportunity to participate in the implementation and review of these

²²⁰ Haufler above n 13, 2. See also Christine Parker, *The Open Corporation: Effective Self-Regulation and Democracy* (Cambridge University Press, 2002); A Ogus, 'Regulatory Institutions and Structures' (2002) 73(4) *Annals of Public and Cooperative Economics* 627; Julia Black, 'Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes' (2008) 2(2) *Regulation & Governance* 137.

²²¹ Haufler, above n 13, 2.

initiatives.²²² Chapters 10 and 11 discuss two important ways in which the transparency and accountability of food industry self-regulation could be improved. The first is the inclusion of public health stakeholders in regulatory processes, while the second involves government intervention to secure the public's interest in the self-regulation. Before considering these possible improvements to the scheme, Chapters 8 and 9 examine how food industry self-regulation operates at industry and company levels.

²²² Webb, above n 33, 2.

CHAPTER 8

The institutional influences on food industry self-regulation

This chapter focuses on the industry-level factors that contribute to successful self-regulation. According to literature from regulatory studies and government guides, self-regulation works best when the following conditions are present:¹

- A high level of industry cohesion, i.e. the industry is dominated by a few large companies;
- Product homogeneity: the products produced are similar and easy to compare;
- There is industry-wide commitment and capacity to self-regulate, including the existence of a trade association that can administer the scheme;
- A strong rationale exists for creating codes of conduct;
- There are tangible economic benefits for companies that join the scheme; and
- Public and private interests coincide, i.e. self-regulation represents a ‘win-win’ situation for the industry concerned and the public.

In this chapter, I examine whether the conditions listed above are present in the Australian food industry and in relation to the RCMI and the QSRI. Chapters 8 and 9 also expand the comparison of food and alcohol advertising self-regulation begun in Chapter 6 and 7. While both food and alcohol have special systems of regulation for their advertising, the structures and institutions of the two industries differ, as do the products themselves. Additionally, since the ABAC was introduced in 1998, there has been considerable opportunity to assess its performance. In contrast, the food industry’s scheme is relatively new and has been subject to less analysis and evaluation. Below I consider whether some of the shortcomings in alcohol advertising self-regulation also apply to the food industry initiatives. From this I draw some

¹ Chapter 4 describes how I selected these criteria. See, e.g., Joseph Rees, *Hostages of Each Other: The Transformation of Nuclear Safety Since Three Mile Island* (The University of Chicago Press, 1994); Neil Gunningham and Joseph Rees, 'Industry Self-Regulation: An Institutional Perspective' (1997) 19(4) *Law & Policy* 363, 370; Neil Gunningham, Peter Grabosky and Darren Sinclair, *Smart Regulation: Designing Environmental Policy* (Clarendon Press, 1998); Australian Competition and Consumer Commission, 'Guidelines for Developing Effective Voluntary Industry Codes of Conduct' (Commonwealth of Australia, July 2011) <<http://transition.accc.gov.au/content/index.phtml/itemId/658186>>; Australian Communications and Media Authority, 'Optimal Conditions for Effective Self- and Co-Regulatory Arrangements' (ACMA, September 2011) Commonwealth of Australia <<http://www.acma.gov.au/theACMA/optimal-conditions-for-effective-self-and-coregulatory-arrangements>>; Australian Government, 'Best Practice Regulation Handbook' (Australian Government, 2011) 43-44 <<http://www.finance.gov.au/obpr/proposal/gov-requirements.html>>.

general conclusions about the value of industry self-regulation as a public health measure, as well as industry's likely response to public demands to improve its products and marketing practices.²

The chapter begins by describing the structure of the food and alcohol industries, their interests and key players. Next, I compare the nature of food and alcohol products, the capacity of each industry to self-regulate, and the administrative arrangements for food and alcohol industry codes. Finally I consider the rationale behind the adoption of self-regulation in the two industries and whether it benefits both consumers and participating firms. To compare the food and alcohol industries, I draw upon data from a range of sources, including RCMI and QSRI participants' company action plans,³ the Australian Food and Grocery Council's (AFGC) reports on the scheme,⁴ the independent review of the codes,⁵ and my interviews with representatives from the AFGC, alcohol industry trade associations, the Australian Association of National Advertisers (AANA), public health organisations, and food and alcohol industry companies.

1. Industry structure

Self-regulation works best in industries dominated by a small number of large companies,⁶ because it is easier to achieve wide code coverage in a concentrated industry, where large firms share similar interests and can agree on common standards.⁷ Companies are also more likely to self-regulate in a competitive industry, because there are stronger commercial incentives for companies to respond to consumer demands, motivating companies to join voluntary schemes as a way of differentiating their products or for fear of losing market share.⁸ In turn, the existence of market incentives to comply with self-regulation increases the

² The introduction of this thesis outlines other reasons for my comparison of tobacco, food and alcohol advertising regulation.

³ These are available on the Australian Food and Grocery Council's website. See Australian Food and Grocery Council, *Signatories* (2010) <<http://www.afgc.org.au/industry-codes/advertising-to-children/rcmi/company-action-plans.html>>; Australian Food and Grocery Council, *Signatories* (2010) <<http://www.afgc.org.au/component/content/article/15-industry-codes/1217-qsr-initiative-signatories.html>>.

⁴ See Australian Food and Grocery Council, *RCMI Reports* (2010) <<http://www.afgc.org.au/industry-codes/advertising-to-children/rcmi/rcmi-reports-2009.html>>; Australian Food and Grocery Council, *QSR Initiative Reports* (2010) <<http://www.afgc.org.au/industry-codes/advertising-to-children/qsr-initiative/initiative-reports.html>>.

⁵ Susannah Tymms, 'Responsible Advertising to Children: An Independent Review of the Australian Food and Beverage Industry Self-Regulatory Codes' (AGFC, October 2012) <<http://www.afgc.org.au/industry-codes/advertising-to-children/rcmi/rcmi-reports-2009.html>>.

⁶ Gunningham and Rees, above n 1, 394.

⁷ Australian Communications and Media Authority, above n 1, 10.

⁸ Ibid; Taskforce on Industry Self-Regulation, 'Industry Self-Regulation in Consumer Markets' (Commonwealth of Australia, 2000) 48 <<http://archive.treasury.gov.au/contentitem.asp?ContentID=1123>>.

scheme's chance of success.⁹ Where large firms dominate the self-regulatory system, the content of standards is likely to benefit them to the detriment of smaller actors. If smaller firms see little to gain from voluntary schemes, they are unlikely to join, meaning that the scheme will not benefit the industry as a whole.¹⁰ Thus, the structure of the industry has implications for the coverage of the scheme, which is an important determinant of successful self-regulation.

The food industry

The food industry is highly diverse, with a range of interests, institutions and players.¹¹ It is divided into four main components: primary production; processing raw food commodities for consumption; retailing food products to consumers; and distribution and wholesale networks linking the production, processing and retail sectors.¹² The industry encompasses a huge array of companies that produce and retail food and beverages. In addition, there are the enterprises that support the industry by making and selling fertilizer, seeds and feed, providing machinery, labour, real estate and financial services, and transporting, storing, distributing and exporting its products.¹³ This chapter focuses on the manufacturing and food service sectors, as food manufacturers and quick service restaurants are the targets of food advertising codes.¹⁴

Food and beverage manufacturing makes a significant contribution to the Australian economy, with a total turn-over of \$87.4 billion in 2010-11.¹⁵ Food manufacturing is also Australia's largest manufacturing sector, employing approximately 296,300 people and accounting for over a quarter of the total number of people employed in the manufacturing

⁹ Taskforce on Industry Self-Regulation, above n 8, 48.

¹⁰ Anil K Gupta and Lawrence J Lad, 'Industry Self-Regulation: An Economic, Organisational and Political Analysis' (1983) 8(3) *The Academy of Management Journal* 416.

¹¹ Department of Agriculture, Fisheries and Forestry, 'Australian Food Statistics 2010-2011' (Department of Agriculture, Forestry and Fisheries, 2012) 25 <<http://www.daff.gov.au/agriculture-food/food/publications/afs>>. See also Christopher Reynolds, *Public Health and Environmental Health Law* (Federation Press, 2011) 325.

¹² Robert Delforce, Andrew Dickson and John Hogan, 'Australia's Food Industry: Recent Changes and Challenges' (2005) 12(2) *Australian Commodities* 379.

¹³ Marion Nestle, *Food Politics: How the Food Industry Influences Nutrition and Health* (University of Cambridge Press, 2002) 11.

¹⁴ The foodservice sector encompasses all the businesses that sell meals to consumers, including takeaway food outlets and quick serve restaurants, independent restaurants, cafés and other dining venues, as well as food sales at leisure, travel and event venues. See S Spencer and M Kneebone, 'FOODmap: An Analysis of the Australian Food Supply Chain' (Department of Agriculture, Fisheries and Forestry, 2012) 82-88 <<http://www.daff.gov.au/agriculture-food/food/publications/foodmap-a-comparative-analysis>>.

¹⁵ Australian Food and Grocery Council, *State of the Industry 2012. Essential Information: Facts and Figures* (2012) 2 <<http://www.afgc.org.au/media-releases/1295-state-of-the-industry-2012-report-underlines-challenging-conditions.html>>.

industry.¹⁶ Australian food manufacturers operate in a highly competitive global market, with local manufacturers competing with emerging export countries such as Brazil and China.¹⁷ Over the past few decades, deregulation and microeconomic reform have facilitated mergers and acquisitions within food manufacturing, as well as vertical integration with agricultural businesses.¹⁸ Once the supply chain was segmented according to ownership; now companies operate across the production, manufacturing and retailing sectors.¹⁹ Additionally, there is a strong international presence in the Australian industry: multinational corporations make up 23 of the top 50 food and beverage manufacturers, and produce approximately one third of Australia's processed foods and beverages.²⁰

Quick Service Restaurant (QSR) chains make up the largest segment of the takeaway retail food market, which also includes small, independent take-away retailers, mobile and street vendors, and leisure venues serving food and beverages (such as cinemas, theatres and racecourses).²¹ QSR companies typically run their outlets on a franchise basis, and 'meal ingredients are centrally purchased and supplied according to tight specifications through sophisticated logistics and management practices'.²² The leading companies in the Australian industry are Domino's, Hungry Jacks (an Australian owned franchisee of Burger King), McDonald's and Yum! Brands, which owns KFC, Pizza Hut and Taco Bell.²³ Other prominent QSRs in Australia are Donut King, Eagle Boys, Subway, Nando's and Quick Service Restaurant Holdings, which is wholly Australian-owned and controls Red Rooster, Oporto's and Chicken Treat.²⁴ Between 1998 and 2010, the share of weekly household expenditure on food and beverages devoted to meals out and takeaway food prepared away from home rose from 23 to 27 per cent.²⁵ Despite the economic downturn, and signs of

¹⁶ Ibid.

¹⁷ See, e.g., Delforce, Dickson and Hogan, above n 12; Department of Agriculture, Fisheries and Forestry, *National Food Plan Green Paper 2012* (Department of Agriculture, Fisheries and Forestry, 2012) 4 <<http://www.daff.gov.au/nationalfoodplan/development/green-paper>>.

¹⁸ Shauna Phillips and Fredoun Z Ahmadi-Esfahani, 'Export Market Participation, Spillovers, and Foreign Direct Investment in Australian Food Manufacturing' (2010) 26(3) *Agribusiness* 329. See also Department of Agriculture, Fisheries and Forestry 'Australian Agriculture and Food Sector Stocktake' (Commonwealth of Australia, 2005) 75 <<http://www.daff.gov.au/agriculture-food/agfoodgroup>>.

¹⁹ Delforce, Dickson and Hogan, above n 12, 379-380.

²⁰ Department of Agriculture, Fisheries and Forestry, 'Australian Agriculture and Food Sector Stocktake', above n 18.

²¹ MarketLine, *Fast-Food in Australia* (2012) 6 <<http://www.marketline.com/>>. See also Spencer and Kneebone, above n 14, 86.

²² MarketLine, above n 21, 86.

²³ Ibid; Yum! Brands *Our Brands* (undated) <<http://www.yum.com/brands/>>.

²⁴ See Spencer and Kneebone, above n 14, 86; Quick Service Restaurant Holdings, *Welcome to QSR Holdings* (2012) <<http://www.qsrh.com.au/>>.

²⁵ Department of Agriculture, Forestry and Fisheries, 'Australian Food Statistics 2010-2011', above n 11, 11.

saturation in the market, investment in the industry remains high and the large QSR chains continue to open new outlets across the country.²⁶

'Big Food' dominates all sectors of the food industry, comprising large multinational companies that operate in hundreds of markets around the world, and across all elements of the food supply chain.²⁷ Rather than being a competitive market, the global food system can be described as an oligarchy, particularly considering the rapid expansion of Big Food in low and middle-income countries.²⁸ The main business of Big Food is manufacturing and retailing processed products, a significant proportion of which are high in fat, salt and sugar.²⁹ Through transnational food production and marketing (facilitated by trade liberalisation), large food manufacturers and retailers shape national and global eating patterns, shifting consumers' diets towards more highly processed products and sugar sweetened beverages.³⁰ Between 2000 and 2005 the global value of sales of packaged food increased from US\$1.095 billion to US\$1.455 billion, with the fastest growth in snack bars (48 per cent value growth), ready meals (45 per cent) and chilled processed food (41 per cent).³¹ Studies link frequent consumption of these and other processed products with obesity and weight gain, as well as associated diseases such as cardiovascular disease and type 2 diabetes.³² For these reasons,

²⁶ Ibid.

²⁷ See Kelly D Brownell and Kenneth E Warner, 'The Perils of Ignoring History: Big Tobacco Played Dirty and Millions Died. How Similar is Big Food?' (2009) 87(1) *The Milbank Quarterly* 259, 263; David Stuckler and Marion Nestle, 'Big Food, Food Systems and Global Health' (2012) 9(6) *PLoS Medicine* 1 <<http://www.plosmedicine.org/article/info%3Adoi%2F10.1371%2Fjournal.pmed.1001242>>.

²⁸ Stuckler and Nestle, above n 27; Lawrence Busch and Carmen Bain, 'New! Improved? The Transformation of the Global Agrifood System' (2004) 69(3) *Rural Sociology* 321; David Stuckler et al, 'Manufacturing Epidemics: The Role of Global Producers in Increased Consumption of Unhealthy Commodities Including Processed Foods, Alcohol, and Tobacco' (2012) 9(6) *PLoS Medicine* 1 <<http://www.plosmedicine.org/article/info%3Adoi%2F10.1371%2Fjournal.pmed.1001235>>.

²⁹ Stuckler and Nestle, above n 27; Stuckler et al, above n 28; David S Ludwig and Marion Nestle, 'Can the Food Industry Play a Constructive Role in the Obesity Epidemic?' (2008) 300(15) *Journal of the American Medical Association* 1808, 1810.

³⁰ Ibid.

³¹ Corinna Hawkes, 'The Influence of Trade Liberalisation and Global Dietary Change: The Case of Vegetable Oils, Meat and Highly Processed Foods' in Corinna Hawkes et al (eds), *Trade, Food, Diet and Health* (Blackwell Publishing, 2010) 35, 54.

³² See, e.g., Mattias B Schulze, et al, 'Sugar-Sweetened Beverages, Weight Gain and Incidence of Type 2 Diabetes in Young and Middle-Aged Women' (2004) 292(8) *Journal of the American Medical Association* 927; Mark A Pereira et al, 'Fast-Food Habits, Weight Gain, and Insulin Resistance (the CARDIA Study): 15-Year Prospective Analysis' (2005) 365(9453) *The Lancet* 36; Vasanti S Malik, Mattias B Schulze and Frank B Hu, 'Intake of Sugar-Sweetened Beverages and Weight Gain: A Systematic Review' (2006) 84(2) *American Journal of Clinical Nutrition* 274; Luis A Moreno and Rodriguez Gerardo, 'Dietary Risk Factors for Development of Childhood Obesity' (2007) 10(3) *Current Opinion in Clinical Nutrition & Metabolic Care* 336.

public health advocates view Big Food as a significant contributor to the 'industrial epidemic' of obesity and overweight.³³

Consolidation of the food industry creates the potential for effective self-regulation, as it enables industry cooperation and collaboration as well as broad coverage of advertising codes. Global food companies are more likely than small businesses to undertake large-scale marketing campaigns that include a wide range of promotional activities. The top multinational food companies are Ferrero, General Mills, Grupo Bimbo, Kellogg's, Kraft Foods, Mars, Nestlé, PepsiCo, The Coca-Cola Company and Unilever. Together these companies account for around 80 per cent of the global advertising spend in the food and beverage industry, and collectively have annual revenues in excess of \$350 billion.³⁴ Apart from Grupo Bimbo, all of these companies have a presence in the Australian market. Accordingly, convincing them to join advertising pledges would result in the regulation of a large proportion of food advertising.

In practice the RCMI and QSRI have limited coverage. A particular problem is that the AFGC does not require compliance with the codes as a condition of its membership. Yet trade associations often specify that members must comply with voluntary schemes as a means of increasing participation in self-regulation.³⁵ Table 19 below outlines the companies that are signatories to the RCMI, their brands and core products, and some examples of prominent companies that have not joined the code. In 2009, only 11 of the 36 food companies advertising on television were signatories to the RCMI.³⁶ Since 2009, three new companies have joined the code, bringing its total membership from 14 to 17.³⁷ The RCMI thus covers less than half of the food companies that advertise on television.

³³ See, e.g., Nestle, above n 13; Stuckler and Nestle, above n 27; Stuckler et al, above n 28; Kelly D Brownell and Katherine Battle Horgen, *Food Fight: The Inside Story of the Food Industry, America's Obesity Crisis and What We Can Do About It* (McGraw-Hill, 2004); Eric Schlosser, *Fast-Food Nation: The Dark Side of the All-American Meal* (Harper Perennial, 1st Harper Perennial ed, 2005); Rene I Jahiel and Thomas F Barbor, 'Industrial Epidemics, Public Health Advocacy and the Alcohol Industry: Lessons from other Fields' (2007) 102(9) *Addiction* 1335; Nicholas Freudenberg, 'The Manufacture of Lifestyle: The Role of Corporations in Unhealthy Living' (2012) 33(2) *Journal of Public Health Policy* 244.

³⁴ Tara Acharya et al, 'The Current and Future Role of the Food Industry in the Prevention and Control of Chronic Diseases: The Case of PepsiCo' in David Stuckler and Karen Siegal (eds), *Sick Societies: Responding to the Global Challenges of Chronic Disease* (Oxford University Press, 2011) 187, 191.

³⁵ Tymms, above n 5, 42.

³⁶ Lesley King et al, 'Industry Self-Regulation of Television Food Advertising: Responsible or Responsive?' (2011) 6(2 pt 2) *International Journal of Paediatric Obesity* e390, e394 <<http://onlinelibrary.wiley.com/doi/10.3109/17477166.2010.517313/full>>.

³⁷ Tymms, above n 5, 52.

The AFGC estimates that 2012 membership of the RCMI represented a market share of 80 per cent of all food advertisers.³⁸ However, it does not provide the criteria it used to determine this figure. Also, there are no data quantifying the percentage of food and beverage marketing to children that is undertaken by signatory companies, making it impossible to confirm that the RCMI applies to the majority of food advertising.³⁹ However, researchers note that levels of participation in the Australian scheme are substantially lower than the US, where 71 per cent of food advertisers participate in the *Children's Food and Beverage Advertising Initiative* (CFBAI).⁴⁰ Some of the food manufacturers that have not joined the RCMI are Goodman Fielder, Schweppes, and Snack Brands Australia.⁴¹

³⁸ Ibid 51.

³⁹ Ibid 61.

⁴⁰ King et al, 'Industry Self-Regulation of Television Food Advertising: Responsible or Responsive?' above n 36, 7.

⁴¹ Obesity Policy Coalition, *Policy Brief: Food Advertising Voluntary Codes* (2011) 2 <http://www.opc.org.au/paper.aspx?ID=volcodes_polbrief&Type=policydocuments>.

Table 19. Participants and non-participants to the RCMI*

RCMI participants	Major products and brands	Examples of non-participants	Major brands and products
Campbell Arnott's	Baked snacks, prepared meals and beverages. Brands include Country Ladle, Tim Tam, Tiny Teddy, Shapes.	Bulla Dairy Foods	Dairy products and frozen desserts, including cream, ice-cream and frozen yoghurt.
Coca-Cola South Pacific	Soft drinks including Coke, Diet Coke, Coke Zero, Fanta and Lift, bottled water, bottled tea, fruit drinks, sport drinks, dairy-based beverages.	Frucor Beverages	Fruit juices, fruit drinks, energy drinks, water, soft drinks. Brands include 'V' energy drink, H2Go water, Fresh-Up.
Ferrero	Confectionery products like Kinder Surprise, Tic Tac, Ferrero Rocher and the Nutella spread.	Go Natural	Snack bars, nuts, meal bars and fruit snacks, all using the Go Natural brand.
Fonterra Brands	Dairy products such as milk, yoghurt, cheese, ice-cream and butter. Brands include Mainland, Anchor and Calci Yum.	Goodman Fielder	Bread, baking ingredients, baked goods, dairy products, condiments, spreads and oils. Brands include Helga's, Edmonds, White Wings.
General Mills	Baking mixes and Italian and Mexican meal kits. Brands include Latina, Old El Paso and Nature Valley.	Jalna Dairy Foods	Yoghurt and sour cream, marketed through the Jalna brand.
George Weston Foods	Grain smallgoods and hot beverages, marketed through brands like Tip Top, Bûrger and Twinings.	McCain Foods	Frozen fruits and vegetables, pizzas, meals and snacks, promoted under the McCain brand.
Kellogg's	Breakfast cereals and snack foods. Brands include Cornflakes, Coco Pops and Rice Bubbles.	Schweppes	Non-alcoholic beverages and cordials, including Schweppes soft drinks and Gatorade sports drink.
Kraft Foods	Confectionery products and spreads, including Cadbury Dairy Milk chocolate and Kraft peanut butter.	Snack Brands Australia	Snacks and potato chips including Thins chips, CCs corn chips, and Kettle chips.
Lion	Alcoholic and non-alcoholic beverages and dairy products. Brands include Pura, Berri, Coon, Tooheys, Hahn, Boag and Heineken.		
Mars Snackfood	Confectionery, gum, pasta sauce, cereals and petfoods. Brands include Mars, M&Ms, Extra, Dolmio, Uncle Bens, Dine and Pedigree.		
Nestlé	Beverages, confectionery, ice-cream and chilled dairy products. Brands include Milo, Peters and Uncle Toby's.		
Patties Foods	Frozen food products, including Four n' Twenty pies, Nanna's frozen desserts and Patties' party foods.		
Sanitarium	Cereals, soy milks, spreads, easy-cook vegetarian meals, nuts and dried foods.		
Simplex	Convenience meals, chilled, frozen and canned foods. Brands include Birds Eye, John West and Lean Cuisine.		
Pepsico	Snackfoods including Smith's and Red Rock Deli chips, Doritos corn chips, Pepsi, and beverages like Pepsi, Pepsi Max and Gatorade.		
Unilever	Beverages, spreads, ice-creams, soups, sauces and seasonings. Brands include Streets, Liptons and Continental.		

* Note that Cereal Partners Worldwide is also a signatory to the code, however as this entity is a joint venture between Nestlé and General Mills (both signatories in their own right), I have not included it in the table. See Cereal Partners Worldwide, *Combining Forces over Two Decades* (2008) <<http://www.cerealpartners.com/cpw/company.html>>.

Table 20 sets out the companies that participate in the QSRI, as well as QSRs that operate outside the scheme. The code's membership has remained the same since its creation, with only seven restaurant brands participating in the scheme.¹ Further, these brands are owned by four major companies, meaning that in practice the QSRI has only four signatories. Together these companies hold a significant share of the QSR market.² However, several prominent companies have not joined the scheme, including Domino's, Nando's and Eagle Boys Pizza.³ Subway committed to becoming a member of the scheme in 2012, but there is no evidence that it has in fact done so.⁴ Internationally, it appears that QSR chains are joining self-regulation at lower rates than food manufacturers.⁵ For example, there are 17 signatories to the US CFBAI, but McDonald's and Burger King are the only two restaurants that participate in the scheme. Other leading QSRs (including Yum! Brands and Subway) remain outside the initiative.⁶

¹ Ibid.

² See Spencer and Kneebone, above n 14, 86.

³ J Lumley, J Martin and N Antonopoulos, 'Exposing the Charade: The Failure to Protect Children from Unhealthy Food Advertising' (Obesity Policy Coalition, 2012) 10 <<http://www.opc.org.au/paper.aspx?ID=exposing-the-charade&Type=policydocuments>>.

⁴ Australian Food and Grocery Council, *Response: In Response To: Healthy Kids Association Incorporated - Final Report on the Compliance of Signatories to the Australian Quick Service Restaurant Industry Initiative for Responsible Advertising to Children* (9 January 2012) 5 <<http://www.afgc.org.au/tools-guides-.html>>. The relevant page on the AFGC's website does not list Subway as a signatory to the QSRI. See Australian Food and Grocery Council, *Signatories* (2010) <<http://www.afgc.org.au/component/content/article/15-industry-codes/1217-qsr-initiative-signatories.html>>.

⁵ Consumers International, 'Left Wanting More: Food Company Policies on Marketing to Children' (Consumers International, March 2009) 10 <http://www.consumersinternational.org/news-and-media/resource-zone/left-wanting-more-a-survey-of-food-companies-policies-on-marketing-to-children#.UbbB3h9-_cs>; Vivica I Kraak et al, 'Industry Progress to Market a Healthful Diet to American Children and Adolescents' (2011) 41(3) *American Journal of Preventive Medicine* 322; Corinna Hawkes and Jennifer L Harris, 'An Analysis of the Content of Food Industry Pledges on Marketing to Children' (2011) 14(8) *Public Health Nutrition* 1403, 1406.

⁶ Better Business Bureau, *Children's Food and Beverage Advertising Initiative* (2013) <<http://www.bbb.org/us/childrens-food-and-beverage-advertising-initiative/>>. See also Kraak et al, above n 46, 326.

Table 20. Participants and non-participants to the QSRI

QSRI participants	Main products and brands	Non-participants	Main products and brands
Hungry Jack's	Hamburgers, desserts, drinks and salads, and meals including the Whopper and Whopper Junior Burger Meals and Hungry Jack's Kids Meals.	Domino's Pizza	Ready-to-eat pizzas, drinks, desserts and sides.
McDonald's Australia	Fast-food meals and snacks, including breakfast-foods, burgers, French fries, salads and wraps, frozen desserts and drinks. Meal options include the children's Happy Meal.	Donut King	Donuts, hot dogs, frozen desserts and cakes.
QSR Holdings	Chicken meals and products, including roasted chicken, burgers, baguettes and salad, marketed through the Oporto, Red Rooster and Chicken Treat brands.	Eagle Boys Pizza	Ready-to-eat pizzas, sides, breads and desserts.
Yum! Brands	Chicken, pizza and Mexican-style products. Yum! owns restaurant brands KFC and Pizza Hutt.	Nando's	Cooked chicken, chicken burgers, kid's meals, snacks and sides.

Chapter 9 describes how code signatories perceive that the activities of non-participants hamper the schemes' operation.⁷ Accordingly, the independent reviewer recommended making compliance a condition of AFGC membership.⁸ She also suggested gathering data on the extent of code ratification amongst all food and beverage manufacturers in Australia, and the extent of code coverage in terms of the percentage of all food and beverage marketing directed to children. This would provide the baseline data necessary for developing a code recruitment strategy, and for monitoring progress on recruiting new companies.⁹ Regardless of the method used to increase membership, more companies that engage in food advertising must join the codes if self-regulation is to be effective.¹⁰ This would create a more level

⁷ See also Tymms, above n 5, 42, 60-61.

⁸ Ibid 61.

⁹ Ibid 63.

¹⁰ See also SA Health, 'Discussion Paper: Australian Children's Exposure to the Advertising and Marketing of Energy-Dense, Nutrient-Poor Foods and Beverages: Strengthening Current Arrangements' (Government of South Australia, 9 May 2012) 15 <http://www.sahealth.sa.gov.au/wps/wcm/connect/879776804b29e174af00afe79043faf0/Food+marketing+seminar_9+May+2012_Discussion-paper.pdf?MOD=AJPERES&CACHEID=879776804b29e174af00afe79043faf0>.

playing field across the industry, ensuring that code signatories are not operating at a competitive disadvantage.

The alcohol industry

Like the food manufacturing industry, the alcohol industry is marked by an increasing degree of concentration and foreign ownership following rapid global consolidation.¹¹ A few large local and multi-national companies own Australian alcohol beverage operations. Several of these companies also produce food and non-alcoholic beverages, creating overlaps between the food and alcohol manufacturing industries.¹² Alcohol manufacturing is divided into three sectors: beer, wine and spirits. Each of these sectors has varying patterns of employment, profit and competition and different shares of consumer alcohol consumption.¹³ Spirit manufacturing is much smaller than beer and wine, while the wine market is bigger than beer on all measures except for value added.¹⁴ In 2010-2011, per capita consumption of pure alcohol consisted of 4.23 litres of beer, 3.74 litres of wine and 1.32 litres of spirits (and an additional 0.70 litres of 'Ready-to-Drink' (RTDs) or premixed beverages).¹⁵

The three sectors are also marked by different degrees of consolidation and foreign ownership. The beer industry is dominated by two foreign-owned companies (SABMiller and Lion Nathan), which together control almost 90 per cent of the Australian market. A number of smaller and boutique producers make up the remaining market share, including the privately-owned Coopers brewery.¹⁶ Two of the top three wine-makers are also foreign-owned, but the wine industry retains a higher degree of Australian control than beer or spirits

¹¹ Tim Stockwell and David Crosbie, 'Supply and Demand for Alcohol in Australia: Relationships Between Industry Structures, Regulation and the Marketplace' (2001) 12(2) *International Journal of Drug Policy* 139; L Hill, 'The Alcohol Industry' in Kris Heggenhougen and Stella Quah (eds), *International Encyclopaedia of Public Health* (Academic Press, 2008) 124; David H Jernigan, 'The Global Alcohol Industry: An Overview' (2009) 104(S1) *Addiction* 6, 7; Thomas Barbor et al, *Alcohol: No Ordinary Commodity* (Oxford University Press, 2nd ed, 2010) ch 5.

¹² Ministerial Council on Drug Strategy, 'Alcohol in Australia: Issues and Strategies' (Commonwealth Department of Health and Aged Care, 2001) 17

<[http://www.health.gov.au/internet/drugstrategy/publishing.nsf/Content/alc-strategy/\\$FILE/alcohol_strategy_back.pdf](http://www.health.gov.au/internet/drugstrategy/publishing.nsf/Content/alc-strategy/$FILE/alcohol_strategy_back.pdf)>.

¹³ See David Richardson, *The Liquor Industry. Technical Brief No. 14* (August 2012) The Australia Institute <[http://www.anpha.gov.au/internet/anpha/publishing.nsf/Content/069EF4B635757D09CA257A22001E4D48/\\$File/Submissionper cent2036per cent20-per cent20Foundationper cent20forper cent20Alcoholper cent20Researchper cent20andper cent20Educationper cent20-per cent20Attachmentper cent20A.pdf](http://www.anpha.gov.au/internet/anpha/publishing.nsf/Content/069EF4B635757D09CA257A22001E4D48/$File/Submissionper cent2036per cent20-per cent20Foundationper cent20forper cent20Alcoholper cent20Researchper cent20andper cent20Educationper cent20-per cent20Attachmentper cent20A.pdf)>.

¹⁴ *Ibid* 2. 'Value added' refers to the sales revenue of an industry after deducting the costs of inputs.

¹⁵ Australian Bureau of Statistics, *Apparent Consumption of Alcohol in Australia 2010-2011 (cat no 4307.0.55.001)* (3 May 2012)

<<http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/4307.0.55.001main+features32010-11>>.

¹⁶ Richardson, above n 54, 4-5.

and a larger number of small companies.¹⁷ As a result, it is much more competitive than the beer industry, with the largest player holding just 11.5 per cent of the market.¹⁸ The spirits industry is smaller in scale than the other two sectors. It focuses its activities on re-packaging imported spirits for the local market, and mixing spirits with soft drinks to create RTDs (also called 'alcopops').¹⁹ Five main players control 82 per cent of spirits manufacturing in Australia: Diageo Australia; LINZ Group Holdings; Coca-Cola Amatil; Foster's Group; and Bacardi Lion.²⁰ Of the major players, only Coca-Cola Amatil is Australian-owned, although The Coca-Cola Company (US) owns a 29.5 per cent share of the company.²¹

The monopolistic nature of the alcohol industry suggests a degree of cohesion, with the potential for cooperation between industry actors, as well as wide code coverage. For example, the 2007 ABAC Annual Report states that:²²

Australia's alcohol beverage sector is a mature industry, within which there has been a gradual consolidation of brands over many decades. One desirable consequence of this long-term trend is that... [t]he ABAC Scheme can achieve tremendous reach via a manageable number of signatories. Of the top 50 advertisers, which represents the vast majority of all advertising, more than 98 per cent of the [advertising] spend is covered by companies using the ABAC system.

However, interviews with alcohol industry actors suggested that competition between the different sectors affected the ABAC's operation. For example, one wine industry actor said that wine advertising was less problematic than beer and spirits, because wine makers advertised less than the other two groups, and because wine advertising emphasised attributes of the product or the region it came from rather than associating the beverage with sport, adventure or sexual themes.²³ Because of the smaller quantity of wine advertising, originally wine makers were not required to submit their advertising to the pre-vetting system.²⁴ All alcohol manufacturers that are ABAC participants must now participate in pre-vetting,

¹⁷ Ibid 6; Stockwell and Crosbie, above n 52, 142.

¹⁸ Richardson, above n 54, 6.

¹⁹ With the exception of Bundaberg Rum, which is manufactured in Australia by Diageo (ibid 9. See also Stockwell and Crosbie, above n 52, 142).

²⁰ Richardson, above n 54, 9-10.

²¹ Ibid 10.

²² Management Committee of the ABAC Scheme, *ABAC Annual Report 2007* (2007) 3 The ABAC Scheme <<http://www.abac.org.au/publications/annual-reports/>>.

²³ See also Simone Pettigrew et al, 'The Extent and Nature of Alcohol Advertising on Australian Television' (2012) 31(6) *Drug and Alcohol Review* 797, which found that beer advertisements were more likely to use themes of humour and mateship or sexual themes than advertisements for wine or spirit products.

²⁴ National Committee for the Review of Alcohol Advertising, 'Review of the Self-Regulatory System for Alcohol Advertising: Report to the Ministerial Council of Drug Strategy' (Minister for Health Victoria, 2003) 17-19

<[http://docs.health.vic.gov.au/docs/doc/2E4E141E5A719092CA2578A1000A1CB0/\\$FILE/nkraareport.pdf](http://docs.health.vic.gov.au/docs/doc/2E4E141E5A719092CA2578A1000A1CB0/$FILE/nkraareport.pdf)>.

following recommendations made by the Ministerial Council on Drug Strategy (MCDS) in its 2003 review of the ABAC Scheme.²⁵ Yet while the alcohol industry unites against some forms of government intervention, it cannot be assumed that the interests of the various sectors are always aligned.²⁶ For example, in relation to taxation of alcohol products there is often rivalry rather than cooperation between the different groups within the industry.²⁷ This in turn may affect the coverage and effective operation of industry-based schemes such as the ABAC. For example, the scheme may not capture smaller players that the larger actors view as responsible for a majority of contraventions of the code.²⁸

A related problem is that the ABAC only applies to alcohol manufacturers; it does not cover other actors in the supply chain, particularly alcohol retailers. Coles and Woolworths have progressively increased their presence in alcohol retailing by purchasing major independent retailers and liquor retailing chains, with the two companies now owning approximately half of Australia's liquor retail outlets.²⁹ Coles and Woolworths produce many advertisements, both for alcohol sold in or adjacent to supermarkets, and for their liquor stores.³⁰ It is difficult to quantify exactly how much, as there is limited data on the extent and nature of alcohol retail advertising in Australia. Simone Pettigrew and colleagues found that around one in five advertisements on Australian free-to-air television originated from alcohol retailers (21.1 per cent of total alcohol advertising via this medium).³¹ One study of alcohol advertising in two Victorian newspapers found that between 1989 and 2009, large liquor stores increased their share of print advertising from 30 to 70 per cent. During the same period, boutique or

²⁵ Ibid, although the requirements for pre-vetting differ between the three sectors. See Chapter 2. See also The ABAC Scheme Limited, *The Development of Australia's Alcohol Beverages Advertising (and Packaging) Code* (undated) <http://www.dsica.com.au/content/detail/about_alcohol_alcohol_advertising_and_regulation>; The ABAC Scheme Limited, *The ABAC Scheme: Rules and Procedures* (5 December 2012) cl 5.0 <<http://www.abac.org.au/publications/rules-procedures/>>.

²⁶ Stockwell and Crosbie, above n 52, 158.

²⁷ Ibid. See also Tim Stockwell, 'Working with the Alcohol Industry on Alcohol Policy: Should We Sometimes Sit at the Same Table?' (2007) 102(1) *Addiction* 1; Brewers Association of Australia and New Zealand, Submission No 18 to the Australian National Preventive Health Agency, *Draft Report: Exploring the Public Interest Case for a Minimum (Floor) Price for Alcohol*, 3 December 2012 <<http://www.anpha.gov.au/internet/anpha/publishing.nsf/Content/minimum-price-alcohol-issues-paper>>.

²⁸ National Committee for the Review of Alcohol Advertising, above n 65, 11. See also Chapter 9, where large alcohol manufacturers that I interviewed expressed concern that smaller companies did not adhere to the ABAC's standards.

²⁹ Evan Jones, 'Liquor Retailing and the Woolworths/Coles Juggernaut' (2005) 55 *Journal of Australian Political Economy* 1; Geoffrey Munro, 'Advertising Alcohol: When the Best Isn't Good Enough' (2006) 4(2) *Of Substance* 12.

³⁰ Ingrid Wilson et al, 'A Historical Analysis of Alcohol Advertising in Print Media 1989-2009' (Victorian Health Promotion Foundation, December 2011) 18 <<http://www.vichealth.vic.gov.au/Publications/Alcohol-Misuse/Historical-analysis-of-alcohol-advertising-report.aspx>>.

³¹ Pettigrew et al, above n 64, 799.

specialist outlets decreased their share from 30 to five per cent of all alcohol advertisements.³² These studies suggest that Coles and Woolworths play an important role in the alcohol advertising environment. However, the ABAC Scheme lacks formal monitoring mechanisms that could be used to quantify the total alcohol marketing promotions by retailers as compared to manufacturers. Such data could be used to determine the true extent of the ABAC's coverage.³³

In June 2013 the alcohol industry announced that Woolworths had joined the ABAC Scheme.³⁴ As well as complying with the ABAC's requirements, Woolworths would commit funding towards the scheme and participate in pre-vetting for advertising, naming and packaging of alcohol beverages. However, Coles (and other retailers) remain outside the scheme, despite the ABAC containing a provision on print advertisements by alcohol retailers.³⁵ The ABAC Adjudication Panel will hear public complaints about alcohol retail advertising, and Coles and Woolworths largely cooperate with the complaints adjudication process (for example by withdrawing or modifying advertisements that breach the code).³⁶ However, there is significantly less normative pressure on Coles to do so, given that it is not a member of the scheme and shows little interest in joining. Further, its advertisements are not subject to pre-vetting, which is a crucial part of the alcohol advertising regulatory process. The growing prevalence of advertisements for alcohol retail outlets would seem to refute the industry's claim that the ABAC covers the vast majority of alcohol beverage advertising, although recruiting Woolworths to the scheme is a positive step.³⁷

³² Wilson et al, above n 71, 21.

³³ The Commonwealth Government charged the Australian Preventive Health Agency (ANPHA) with monitoring the compliance of the alcohol industry with voluntary codes of practice and other commitments on responsible alcohol advertising. See Australian Government, 'Taking Preventative Action: A Response to Australia: The Healthiest Country by 2020, The Report of the National Preventative Health Taskforce' (Commonwealth of Australia, 2010) 94 <<http://www.preventativehealth.org.au/>>. ANPHA's *Operational Plan 2012-2013* states that it will review the ABAC and the effectiveness of the code in addressing community concern (see Australian National Preventive Health Agency, *Operational Plan 2012-2013* (undated) 8 Australian Government <<http://anpha.gov.au/internet/anpha/publishing.nsf/Content/anpha-operation-plan-2012-2013>> . At the time of writing this review was in progress, but it is unclear whether ANPHA will play an on-going role in monitoring alcohol advertising. See also the discussion in Chapter 10; Australian National Preventive Health Agency, *Alcohol Advertising: The Effectiveness of Current Regulatory Codes in Addressing Community Concerns. Issues Paper* (December 2012) <<http://www.anpha.gov.au/internet/anpha/publishing.nsf/Content/alcohol-advertising-issues-paper.html>>.

³⁴ The ABAC Scheme Limited, *Woolworths Liquor Group Becomes a Signatory to the Alcohol Beverages Advertising Code* (20 June 2013) <<http://www.abac.org.au/publications/media/>>.

³⁵ See The ABAC Scheme Limited, *Alcohol Beverages Advertising (and Packaging) Code* (March 2012) 3 <<http://www.abac.org.au/publications/thecode/>>.

³⁶ Ibid.

³⁷ See also Peter Jones, David Hiller and Daphne Comfort, 'The Leading Spirits and Beer Companies and Corporate Social Responsibility' (2013) 13(3) *Corporate Governance* 249, 258. The authors argue that alcohol

The case of retail alcohol advertisements points to similar problems with food industry self-regulation. As with the ABAC, the RCMI applies to food manufacturers, but not to retailers. The Australian grocery retail environment is highly concentrated, with the three main supermarkets (Coles, Woolworths and IGA) accounting for 92 per cent of supermarket sales.³⁸ Of the three, Coles and Woolworths dominate, holding a 78 per cent share of total supermarket sales.³⁹ Australian families purchase the majority of their groceries at supermarkets.⁴⁰ Accordingly, these large companies effectively influence national diets through their store locations, promotional strategies, product pricing and availability policies.⁴¹ Supermarkets carry a wide range of unhealthy products that use packaging, labels and give-aways that appeal to children.⁴² However, the RCMI does not extend to product packaging and labelling, nor to forms of in-store promotion that encourage ‘pester power’.⁴³ In the independent review, one RCMI signatory also raised concerns about the fact that as owners of private labels, supermarkets were not covered by the RCMI, creating an uneven playing field in the marketing environment.⁴⁴ This is a significant exception, given that

companies’ commitment to promoting responsible drinking may be undermined by major retailers and pub and night club owners offering cheap alcohol promotions.

³⁸ Australian Food and Grocery Council, *2020: Industry At A Crossroads* (2011) 14 <<http://www.afgc.org.au/2020-industry-at-a-crossroads-report.html>>. See also Jon Wardle and Michael Baranovic, ‘Is Lack of Retail Competition in the Grocery Sector a Public Health Issue?’ (2009) 33(5) *Australian and New Zealand Journal of Public Health* 477.

³⁹ Australian Food and Grocery Council, *2020: Industry at a Crossroads*, above n 79, 41.

⁴⁰ Spencer and Kneebone, above n 14, 10, 80. In its report on the competitiveness of retail grocery pricing, the Australian Competition and Consumer Commission estimated that large supermarket chains accounted for approximately 55 to 60 per cent of consumer expenditure on groceries in 2007. However, it noted the difficulty of establishing this figure precisely, given the various methods used to measure retail grocery turnover. See Australian Competition and Consumer Commission, ‘Report of the ACCC Inquiry into the Competitiveness of Retail Prices for Standard Groceries’ (ACCC, July 2008) 46-48 <<http://www.accc.gov.au/content/index.phtml?itemId=838251>>.

⁴¹ Wardle and Baranovic, above n 79, 480; Corinna Hawkes, ‘Dietary Implications of Supermarket Development: A Global Perspective’ (2008) 26(6) *Development Policy Review* 657; Libby Hattersley and Jane Dixon, ‘Supermarkets, Food Systems and Public Health: Facing the Challenges’ in Geoffrey Lawrence, Kristen Lyons and Tabatha Wallington (eds), *Food Security, Nutrition and Sustainability* (Earthscan, 2010) 188.

⁴² Kathy Chapman et al, ‘The Extent and Nature of Food Promotion Directed to Children in Australian Supermarkets’ (2006) 21(4) *Health Promotion International* 331.

⁴³ See Australian Food and Grocery Council, *The Responsible Children’s Marketing Initiative of the Australian Food and Beverage Industry* (March 2011) 4 <<http://www.afgc.org.au/industry-codes/advertising-to-children/rcmi.html>>. See Lumley, Martin and Antonopoulos, above n 44, 12-14; Helen Dixon, Maree Scully and Kristiina Parkinson, ‘Pester Power: Snackfoods displayed at Supermarket Checkouts in Melbourne, Australia’ (2006) 17(2) *Health Promotion Journal of Australia* 124; Sarah Campbell et al, ‘A Mixed-Method Examination of Food Marketing Directed Towards Children in Australian Supermarkets’ (2012) *Health Promotion International* (Advance Access) 1

<<http://heapro.oxfordjournals.org/content/early/2012/11/14/heapro.das060.short>>.

⁴⁴ Tymms, above n 5, 42.

Australian supermarkets are increasingly developing their own private labels and competing with other products that they stock.⁴⁵

In theory, increased consolidation in the food and alcohol industries creates the conditions for effective self-regulation. However, in practice advertising codes do not sufficiently cover all industry players, particularly the large supermarkets that dominate food and alcohol retailing and produce an array of marketing materials for these products. This points to one of the fundamental problems with self-regulation, namely that it is unlikely to ‘cover the field’.⁴⁶ In contrast, legislative bans on tobacco advertising apply to all forms of tobacco promotion regardless of location, media used, or the company producing the advertisement.⁴⁷

2. The nature of the product

Regulating advertising for food and non-alcoholic beverages

This section considers how the nature of food and alcohol products affects the feasibility of advertising regulation that protects children’s health. Successful self-regulation depends on a degree of product homogeneity, i.e. the characteristic that products are alike and easy to compare.⁴⁸ However, the food industry makes a profusion of snacks, cereals, meals, confectionery and beverages,⁴⁹ with product diversity increasing as the market becomes more competitive.⁵⁰ Participants in advertising pledges own a vast array of products and brands, with portfolios that contain both healthy and unhealthy processed foods. High levels of variation between products makes it difficult, if not impossible, for consumers to identify which company owns a particular brand or product and whether that company is a signatory to advertising codes. In real terms, this cancels out one of the benefits of self-regulation, namely that customers can use voluntary codes to distinguish between ‘good’ and ‘bad apples’ and make purchase choices based on whether companies practice responsible

⁴⁵ See Australian Competition and Consumer Commission, 'Report of the ACCC Inquiry into the Competitiveness of Retail Prices for Standard Groceries', above n 81, ch 16. See also David Burch and Geoff Lawrence, 'Supermarket Own Brands, Supply Chains and the Transformation of the Agri-Food System' (2005) 13(1) *International Journal of Sociology of Agriculture and Food* 1.

⁴⁶ Management Committee of the ABAC Scheme, *The ABAC Scheme Annual Report 2005* (2005) 8 The ABAC Scheme <<http://www.abac.org.au/publications/>>.

⁴⁷ See, e.g., *Tobacco Advertising Prohibition Act 1992* (Cth); *Public Health (Tobacco) Act 2008* (NSW).

⁴⁸ Australian Communications and Media Authority, above n 1, 10.

⁴⁹ Karen Z Walker et al, 'Product Variety in Australian Snacks and Drinks: How Can the Consumer Make a Healthy Choice?' (2008) 11(10) *Public Health Nutrition* 1046, 1051.

⁵⁰ Busch and Bain, above n 28, 330.

advertising.⁵¹ Consumers cannot ‘sanction’ non-compliant companies by boycotting their products, unless they are able to inform themselves of the company’s product range and are prepared to forego purchasing any of those products. Product complexity also makes it more difficult for code participants to monitor the behaviour of competitor companies and to detect if they are breaching self-regulation.⁵²

A second problem with food advertising regulation is that food products are nutritionally complex, and the harm they cause is the result of prolonged or over-consumption, rather than consumption per se.⁵³ Also, a range of factors determine individual nutritional intake, including the type of foods and beverages consumed, their portion size, the frequency of their consumption and the variety of different foods that comprise an individual’s diet.⁵⁴ Nevertheless, evidence suggests that some products (i.e., those high in salt, fat and/or sugar) make a greater contribution to weight gain than others.⁵⁵ For this reason, obesity prevention initiatives (such as food labelling and advertising restrictions) often draw on nutrient profiling that categorises foods according to their nutritional composition (for example, high fat or high salt),⁵⁶ or by their effects on health (for example, ‘healthy’, ‘less healthy’ or ‘good for your heart’).⁵⁷

The use of nutrient profiling is complicated by disagreement over how the nutritional quality of food and beverage products should be conceptualized. The food industry argues that there are no ‘good’ and ‘bad’ foods, and that all of its products can form part of a balanced diet.⁵⁸ However, the public health community argues that some foods are markedly better than others, and that individuals clearly need to increase their intake of fruits and vegetables, and decrease their consumption of highly processed products, fast-foods and sweetened

⁵¹ Tim Bartley, 'Institutional Emergence in an Era of Globalization: The Rise of Transnational Private Regulation of Labour and Environmental Conditions' (2007) 113(2) *American Journal of Sociology* 297, 307.

⁵² Australian Communications and Media Authority, above n 1, 10.

⁵³ See Nestle, above n 13, 1-2; Derek Yach et al, 'The World Health Organisation's Framework Convention on Tobacco Control: Implications for Global Epidemics of Food-Related Deaths and Disease' (2003) 24(3-4) *Journal of Public Health Policy* 274, 275.

⁵⁴ G Sacks et al, 'Applications of Nutrient Profiling: Potential Role in Diet-Related Chronic Disease Prevention and the Feasibility of a Core Nutrient-Profiling System' (2011) 65(3) *European Journal of Clinical Nutrition* 298, 304.

⁵⁵ See Moreno and Gerardo, above n 32; Pereira et al, above n 32; Schulze et al, above n 32; Malik, Schulze and Hu, above n 32; Carlos Monteiro 'The Big Issue is Ultra-Processing' (2010) 1(6) *World Nutrition* 1.

⁵⁶ Sacks et al, above n 95; Mike Rayner, Peter Scarborough and Asha Kaur, 'Nutrient Profiling and the Regulation of Marketing to Children. Possibilities and Pitfalls' (2013) 62 *Appetite* 232.

⁵⁷ Sacks et al, above n 95.

⁵⁸ See, e.g., Nestle, above n 13, pt 1; Brownell and Horgen, above n 33, 16-17.

beverages.⁵⁹ Debates about the healthiness of food products mean that complicated decisions have to be made about what products advertising restrictions will cover, and how the nutritional quality of foods will be defined. Both the RCMI and QSRI use nutrient profile models to distinguish 'healthier choice' products that can be advertised to children from less healthy products that cannot.⁶⁰ As I discussed in Chapter 7, these nutrient criteria create gaps in the coverage of self-regulation, allowing companies to advertise a wide range of unhealthy products to children.⁶¹ Variation between RCMI participants' nutrient criteria also makes regulating food advertising a complicated exercise, impacting upon consumers' ability to lay complaints about breaches of the code.

Regulating alcohol beverage advertising

Alcohol beverages are highly diverse, varying widely in product price, quality and alcohol content.⁶² However, the advertising of alcohol products may be easier to regulate than advertising of food and non-alcoholic beverages, since products are unified by the basic property of containing alcohol. Alcohol is a drug with toxic effects,⁶³ to which young people are more vulnerable than adults.⁶⁴ Accordingly, sales of alcohol in Australia are restricted to individuals 18 years of age and over.⁶⁵ In light of restrictions on the sale of alcohol to young people, there is a strong argument for corresponding limits on advertising that appeals to underage drinkers. As a result, the restrictions contained in the ABAC apply to all alcohol beverage advertisements produced by signatories to the scheme.

Similar arguments apply to advertising for tobacco products: cigarette smoking is toxic, addictive and health damaging, with prohibitions on sales to those under the age of 18 years.⁶⁶

⁵⁹ Jeffrey P Koplan and Kelly D Brownell, 'Response of the Food and Beverage Industry to the Obesity Threat' (2010) 304(13) *Journal of the American Medical Association* 1487.

⁶⁰ Australian Food and Grocery Council, *Responsible Children's Marketing Initiative*, above n 84, 1; Australian Quick Service Restaurant Industry, *Initiative for Responsible Advertising and Marketing to Children* (June 2009) 1 Australian Association of National Advertisers <<http://www.aana.com.au/QuickServiceRestaurantInitiative.htm>>.

⁶¹ See also Lana Hebden et al, 'Industry Self-regulation of Food Marketing to Children: Reading the Fine Print' (2010) 21(3) *Health Promotion Journal of Australia* 229.

⁶² Stockwell and Crosbie, above n 52, 141.

⁶³ See Barbor et al, above n 52, 11.

⁶⁴ See Vered Murgraff, Andrew Parrott and Paul Bennett, 'Risky Single-Occasion Drinking Amongst Young People - Definition, Correlates, Policy and Intervention: A Broad Overview of Research Findings' (1999) 34(1) *Alcohol and Alcoholism* 3, 5-6; P Andersen et al, 'Impact of Alcohol Advertising and Media Exposure to Adolescent Alcohol Use: A Systematic Review Of Longitudinal Studies' (2009) 44(3) *Alcohol and Alcoholism* 229; Jürgen Rehm et al, 'Global Burden of Disease and Economic Cost Attributable to Alcohol Use and Alcohol-Use Disorders' (2009) 373(9682) *The Lancet* 2223, 2228.

⁶⁵ See, e.g., *Liquor Act 2007* (NSW) pt 7.

⁶⁶ See, e.g., *Public Health (Tobacco) Act 2008* (NSW) pt 4; Richard Doll et al, 'Mortality in Relation to Smoking: 50 Years' Observations on Male British Doctors' (2004) 328(7455) *British Medical Journal* 1529,

However, unlike alcohol, there is no safe level of tobacco use, making it easier to justify statutory bans on all tobacco advertising, as opposed to the ‘quasi-regulatory’ restrictions on alcohol advertising in Australia.⁶⁷ The fact that advertising restrictions apply to one product (with little variation between different brands) also facilitates wide-ranging bans on tobacco marketing.⁶⁸ In contrast, the nutritional complexity of food and non-alcoholic beverages, combined with the diverse array of products, companies and brands, makes food advertising regulation a more complicated exercise than regulating either alcohol or tobacco promotion.

3. Industry capacity to self-regulate

Effective self-regulation requires industries to have the will and capacity to act collectively.⁶⁹ Given that self-regulation is based on information exchange, consensus and learning between companies, industry cooperation and cohesion are important.⁷⁰ Industries must also possess institutional structures that facilitate self-regulation; namely, a strong industry association.⁷¹ A representative body can collect information about the industry, analyse this information, monitor firm behaviour for compliance, and detect and enforce non-compliance.⁷² More fundamentally, trade associations can use voluntary codes of conduct to create an ‘industrial morality’ within the industry, i.e. ‘a set of industrial principles and practices that defines right conduct as it spells out the industry’s public commitment to moral restraint and aspiration’.⁷³ However, this relies upon the industry body being able to manage a number of different and potentially competing roles, namely representing the interests of its members as well as acting as a ‘mediating institution’ between individual companies and the state.⁷⁴

1530; M H Winstanley, 'The Health Effects of Active Smoking' in MM Scollo and MH Winstanley (eds), *Tobacco in Australia: Facts and Issues* (Cancer Council Victoria, 2012) ch 3 <<http://www.tobaccoinustralia.org.au/>>; Australian Institute of Health and Welfare and Australasian Association of Cancer Registries, 'Cancer in Australia 2001'. AIHW Cat No CAN 23 (AIHW, 2004) 17 <<http://www.aihw.gov.au/publication-detail/?id=6442467673>>; US Department of Health and Human Services, 'The Health Consequences of Smoking. A Report of the Surgeon General' (US Department of Health and Human Services, Public Health Service, Office of the Surgeon General, 2004) <<http://www.surgeongeneral.gov/library/reports/smokingconsequences/index.html>>.

⁶⁷ Mike Daube, 'Alcohol and Tobacco' (2012) 36(2) *Australia and New Zealand Journal of Public Health* 108.

⁶⁸ See Brownell and Warner, above n 27, 263.

⁶⁹ Joseph Rees, 'Development of Communitarian Regulation in the Chemical Industry' (1997) 19(4) *Law & Policy* 477, 504.

⁷⁰ Gunningham and Rees, above n 1, 394; Australian Communications and Media Authority, above n 1, 10; Gupta and Lad, above n 10, 421-422.

⁷¹ Australian Communications and Media Authority, above n 1, 10; Taskforce on Industry Self-Regulation, above n 8, 46.

⁷² Gupta and Lad, above n 10, 421-422.

⁷³ Gunningham and Rees, above n 1, 376.

⁷⁴ *Ibid.*

The food industry and the AFGC

Big Food drives the creation of institutions that represent the food industry's interests. Consequently, the industry is highly organised and well-resourced, employing lobbyists, lawyers and trade associations to pursue its political agenda.⁷⁵ In 1994, the Australian processed food industry formed the AFGC, an advocacy and lobbying group based in Canberra.⁷⁶ The AFGC has more than 170 members, subsidiaries and associates, who together represent 85 per cent of the gross dollar value of food and beverage manufacturing sector sales.⁷⁷ Its members include multinational companies operating in Australia, such as Cadbury Schweppes, Coca-Cola, Ferrero, Kellogg's, Mars and Nestlé. Some member companies also manufacture alcohol beverages, including Bundaberg Brewed Drinks, Foster's Group, Lion and Coca-Cola.⁷⁸ This illustrates the flow of funds, people and activities between the food and alcohol industries, as well as the tobacco industry.⁷⁹ For example, Philip Morris acquired Kraft and General Foods during the 1980s, making it one of the largest companies in the food and beverage industry.⁸⁰ It also had a substantial shareholding in SABMiller, which now owns Australian breweries Fosters and Carlton United Breweries.⁸¹ Past and present tobacco company executives sit on the boards of these large alcohol companies, strengthening the connections between the alcohol, food and tobacco industries.⁸²

The AFGC's governing body is the AFGC Full Council, comprising the CEOs of all full member companies.⁸³ The Council is responsible for the AFGC's overall policy, strategic direction and resourcing. The AFGC's Board of Directors determines policy, establishes priorities, formulates strategy and allocates resources on behalf of the Council.⁸⁴ The Board is supported by four Standing Committees on Health, Nutrition and Scientific Affairs,

⁷⁵ Brownell and Warner, above n 27, 263.

⁷⁶ Heather Yeatman, 'Window of Opportunity - Positioning Food and Nutrition Policy within a Sustainability Agenda' (2008) 32(2) *Australian and New Zealand Journal of Public Health* 107; Australian Food and Grocery Council, *Who We Are* (2010) <<http://www.afgc.org.au/whoweare.html>>.

⁷⁷ Department of Agriculture, Forestry and Fisheries, 'Australian Agriculture and Food Sector Stocktake', above n 18, 77.

⁷⁸ Australian Food and Grocery Council, Submission No 105 to Department of the Environment, Water, Heritage and the Arts, *Consultation Paper on a National Waste Policy: Managing Waste to 2020*, 13 May 2009, 16 <<http://www.environment.gov.au/wastepolicy/consultation/submissions/>>.

⁷⁹ Stuckler and Nestle, above n 27.

⁸⁰ Thomas A Lyson and Annalisa Lewis Raymer, 'Stalking the Wily Multinational: Power and Control in the US Food System' (2000) 17(2) *Agriculture and Human Values* 199, 202.

⁸¹ Daube, above n 108, 2012.

⁸² *Ibid.*

⁸³ Australian Food and Grocery Council, *Our Organisation* (2010) <<http://www.afgc.org.au/organisation.html>>.

⁸⁴ *Ibid.*

Corporate Affairs, Supply Chain and Sustainable Practices.⁸⁵ The AFGC Secretariat supports the work of the Council and the Committees, including by administering the RCMI and QSRI.⁸⁶ The AFGC describes its advocacy role as follows:⁸⁷

We provide a strong, united voice from industry to government at all levels, along with NGOs, retailers/trading partners, industry groups and the media... As part of our advocacy role, we advance best practice policy, promote industry's views, and make submissions to governments on the development of policy and regulation impacting members.

The AFGC has created a suite of voluntary initiatives, including Daily Intake Guide Labelling, a front-of-pack nutrition-labelling scheme adopted in 2006,⁸⁸ and codes of practice on food labelling, as well as the RCMI and QSRI.⁸⁹ It also participates in the Food and Health Dialogue, which is a collaborative initiative involving industry and government actors that aims to improve nutrition through a program of voluntary product reformulation.⁹⁰ Additionally, in 2012 the AFGC launched its own initiative to address chronic disease ('Together Counts'), including by reducing the salt, fat and energy content of products from participating companies.⁹¹

The alcohol industry's self-regulatory capacity

Unlike food manufacturing, alcohol manufacturers are not united behind one industry body; instead, separate trade associations represent each of the three sectors of the industry. The Distilled Spirits Industry Council of Australia led the creation of the ABAC Scheme, along with the Brewer's Association of Australia and New Zealand, the Winemaker's Federation of Australia, and the Liquor Merchants Association of Australia.⁹² Alcohol industry actors also cooperated to form DrinkWise, an industry-based organisation that focuses on promoting responsible drinking through consumer education (discussed further in Chapter 9).⁹³

⁸⁵ Ibid.

⁸⁶ Ibid.

⁸⁷ Australian Food and Grocery Council, *State of the Industry 2012*, above n 15, foreword.

⁸⁸ See Australian Food and Grocery Council, *Daily Intake Guide: Healthy Eating Made Easier* (2011) <<http://www.mydailyintake.net/>>.

⁸⁹ Australian Food and Grocery Council, *Industry Codes* (2010) <<http://www.afgc.org.au/industry-codes.html>>.

⁹⁰ Department of Health and Aging, *Welcome to the Food and Health Dialogue Website* (28 November 2012) Australian Government <<http://www.foodhealthdialogue.gov.au/internet/foodandhealth/publishing.nsf>>.

⁹¹ Together Counts, *Healthier Australia Commitment Guiding Principles* (2012) <<http://www.togethercounts.com.au/healthy-australia-commitment/>>.

⁹² National Committee for the Review of Alcohol Advertising, above n 65, 2. The Liquor Merchants Association of Australia later left the scheme, following 'changes to its activities'. See The Management Committee of the ABAC Scheme, *The ABAC Scheme Annual Report 2009* (2009) 7 The ABAC Scheme <<http://www.abac.org.au/publications/annual-reports/>>.

⁹³ DrinkWise Australia, *Our Work* (2012) <<http://www.drinkwise.org.au/our-work/>>.

However, while the Australian alcohol industry has a presence in the alcohol policy and regulation field, its initiatives do not form part of a comprehensive approach to self-regulation, as found in the food industry, despite the fact that the alcohol industry is facing similar regulatory threats such as health warning messages and the display of energy content on alcohol beverage labelling.⁹⁴

In summary, the processed food industry benefits from having a strong trade association coordinate its activities, allowing for a unified position on a range of issues and the development of a comprehensive self-regulatory strategy on food and nutrition. This may facilitate adoption of the standards contained in food advertising codes, particularly as self-regulation becomes accepted practice within the industry. In contrast, there appears to be more limited scope for self-regulation in the alcohol industry because of competition between the three separate industry sectors. Nevertheless the alcohol industry has developed relatively sophisticated administrative arrangements for the ABAC Scheme, as will be discussed below.

4. Administration of industry codes

The role of the AFGC in food advertising self-regulation

This section evaluates the extent to which arrangements for the administration of food and alcohol advertising self-regulation in Australia meet the conditions for successful self-regulation. The administrative arrangements for the RCMI and QSRI were introduced in Chapter 7. The AFGC monitors participants' adherence to the codes, coordinates self-reports of compliance and publishes an annual report on the schemes' operation.⁹⁵ In 2012 the AFGC also contracted a consultant to perform an independent review of the RCMI and QSRI, after self-regulation had been had been operating for three years.⁹⁶ The Advertising Standards Board (ASB) handles complaints about breaches of the two codes; however, the AFGC pays for an arbiter with a background in diet and nutrition who participates in the advertising

⁹⁴ The national review of food labelling law and policy recommended that a generic alcohol warning message be placed on alcohol labels, along with a warning about the risks of drinking while pregnant, and that the energy content of alcohol drinks be displayed on containers. It also recommended that drinks containing a mixture of alcohol and other beverages comply with all general nutrition labelling requirements, including disclosure of a mandatory Nutrition Information Panel. See Neal Blewett et al, 'Labelling Logic: Review of Food Labelling Law and Policy' (Australian Government, 2011)78-83
<<http://www.foodlabellingreview.gov.au/internet/foodlabelling/publishing.nsf/content/labelling-logic>>.

⁹⁵ See, e.g., Australian Food and Grocery Council, *Responsible Children's Marketing Initiative 2011 Compliance Report* (2011) <<http://www.afgc.org.au/industry-codes/advertising-to-children/rcmi/rcmi-reports-2009.html>>; Australian Food and Grocery Council, *Food and Beverage Advertising to Children: Activity Report* (May 2012) 5 <<http://www.afgc.org.au/industry-codes/advertising-to-children/rcmi/rcmi-reports-2009.html>>.

⁹⁶ See Tymms, above n 5. See also the discussion of this review in Chapter 7.

complaints determination process.⁹⁷ The arbiter makes a decision about whether an advertised product (that is subject to a complaint) represents a ‘healthy dietary choice’ according to the nutrition criteria used by RCMI and QSRI companies. The ASB then considers whether the advertisement meets the other rules contained in the code.⁹⁸

Apart from its monitoring and review activities, the AFGC disseminates information to participants on how the scheme works. For example, it provides guidance on the scope of the RCMI and what programs are considered ‘directed primarily to children’, according to the terms of the initiative.⁹⁹ The AFGC also publicises the scheme through media releases on the codes’ success in reducing food advertising directed to children, as well on its website.¹⁰⁰ The independent review found that the majority of RCMI signatories (10 out of 17 companies) were happy with the AFGC’s management of the code.¹⁰¹ The remaining seven signatories reported ‘neutral’ feedback on the performance of the AFGC’s secretariat, and there were a number of suggestions for improving its work. Some companies wanted the AFGC to play a greater role in advising on how advertising campaigns could be developed to comply with the codes.¹⁰² Others sought more regular updates about the RCMI, its coverage, associated advocacy activities and recent interpretations of the code’s text.¹⁰³ Some signatories suggested that governance could be improved by granting the Australian Association of National Advertisers (AANA) administration of the codes, linking the food advertising schemes more closely to the AANA’s advertising codes of conduct. However, others felt that this would place a significant burden of work on the AANA, particularly as the RCMI and QSRI require a level of reporting and monitoring that is not demanded by the AANA’s scheme.¹⁰⁴

Food industry self-regulation benefits from tapping into the existing advertising regulatory framework. As the body responsible for hearing and determining complaints about advertising in Australia, the ASB is a well-established component of the advertising self-

⁹⁷ Ibid 19.

⁹⁸ Australian Food and Grocery Council, *Responsible Children's Marketing Initiative 2010 Compliance Report* (2010) 5 <<http://www.afgc.org.au/industry-codes/advertising-kids.html>>.

⁹⁹ See Australian Food and Grocery Council, *Responsible Children's Marketing Initiative*, above n 84, app II.

¹⁰⁰ See, e.g., Australian Food and Grocery Council, *Adverts for Children's Foods 'Virtually Ceased'* (29 March 2010) <<http://www.afgc.org.au/media-releases/media-releases-archived/180-adverts-for-childrens-foods-virtually-ceased.html>>; Australian Food and Grocery Council, *Advertising to Children* (2010) <<http://www.afgc.org.au/industry-codes/advertising-to-children.html>>.

¹⁰¹ Most QSR companies thought that it was too soon to make a judgment on the codes’ operation, due to the fact the AFGC had only recently taken over administration of the QSRI. See Tymms, above n 5, 39.

¹⁰² Ibid.

¹⁰³ Ibid.

¹⁰⁴ Ibid 40.

regulatory system. The independent review found that signatories to the RCMI and QSRI whose food advertising practices had been subject to a complaint held the ASB in high regard.¹⁰⁵ The AANA provides additional oversight of the scheme, as it is responsible for coordinating all of the components of the advertising self-regulatory system. Many members of the AFGC are also members of the AANA, meaning that there are connections between the two associations in relation to self-regulation of food advertising. For example, a senior executive at the AANA said that:

... because the food advertising issue touches on so many players within the industry, we work very cooperatively with our other industry associations, so I know the people at the AFGC well and we have an on-going dialogue in relation to the initiatives.

Thus, the AFGC and AANA work cooperatively on food advertising regulation, providing support for the food industry's scheme.

Although participants are largely happy with the AFGC's management, I argue that it is not the most appropriate body to administer the RCMI and QSRI. The AFGC acts as the 'voice' of the food industry, which may affect whether it can manage the scheme effectively and impartially.¹⁰⁶ Some studies suggest that trade associations can be pivotal to industry-based schemes, but this occurs where they can draw companies together into a community that is united behind a set of guiding principles.¹⁰⁷ Whether trade associations are able to act as a moral authority in the industry depends on a range of factors, including the design of the regulatory scheme, the association's ability to use peer pressure to shame deviant companies and the threat of more punitive measures for on-going non-compliance.¹⁰⁸ However, more often industry interests dominate the work of trade associations, meaning that they are at significant risk of regulatory 'capture' and are unlikely to be effective regulators.¹⁰⁹

Chapter 7 suggested that the AFGC appears reluctant to formally sanction companies that breach the RCMI and QSRI, relying upon persuasion and peer pressure to convince participants to change their practices. This may undermine the credibility of self-regulation in the eyes of the public. Further, it is unlikely to be an effective enforcement method if there is

¹⁰⁵ Ibid 41.

¹⁰⁶ One QSRI participant made a similar comment to the independent reviewer. See Tymms, above n 5, 39.

¹⁰⁷ See Rees, *Hostages of Each Other*, above n 1; Gunningham and Rees, above n 1; Joseph Rees, 'Development of Communitarian Regulation in the Chemical Industry', above n 110.

¹⁰⁸ Ibid; see also Neil Gunningham, 'Environment, Self-Regulation and the Chemical Industry: Assessing Responsible Care' (1995) 17(1) *Law & Policy* 57.

¹⁰⁹ Rees, 'Development of Communitarian Regulation in the Chemical Industry', above n 110, 506.

no threat that the AFGC will follow up with more punitive measures in response to continuing non-compliance.¹¹⁰

The absence of effective enforcement makes food industry self-regulation vulnerable to free-riding. There are two versions of this problem: the first is where companies agree to the terms and conditions of self-regulation, but simply feign compliance. The second is where a significant part of the industry refuses to join the scheme but nevertheless derives reputational benefits from its existence.¹¹¹ In the first case, industry regulators can control free-riding by monitoring compliance and punishing non-compliance. Yet the food industry may find this difficult in light of the AFGC's failure to enforce the codes effectively.

Television networks operate as an intermediary between advertisers and access to broadcast media, meaning that they can control free-riding to some extent.¹¹² For example, Free TV's Commercial Advice Division may refuse to classify an advertisement that fails to meet the requirements of the RCMI and QSRI, meaning that it cannot be broadcast on free-to-air television.¹¹³ However, there is no evidence of Free TV rejecting any non-compliant advertisements, despite research showing multiple breaches of the codes during children's programming.¹¹⁴ In addition, the industry's ability to control free-riders is hampered by the fact that customers may not be able to identify compliant companies, nor may they necessarily value compliant behaviour (discussed further below).¹¹⁵ As discussed above, there are also significant sectors of the industry who are not members of the codes, thereby undermining the code's coverage and the development of sector-wide norms for food advertising to children.

There is also the question of whether the AFGC gives the *appearance* of independence from industry. Regardless of how well it administers the scheme, groups outside the food industry are unlikely to view the AFGC as a credible administrator. Given the difficulties that trade

¹¹⁰ See, e.g., Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Regulation Debate* (Oxford University Press, 1992) ch 2.

¹¹¹ Gunningham and Rees, above n 1, 394; Mancur Olson, *The Logic of Collective Action: Public Goods and the Theory of Groups* (Harvard University Press, 1965). See also the discussion in Chapter 5.

¹¹² J J Boddewyn, *Advertising Self-Regulation and Outside Participation: A Multinational Comparison* (Quorum Books, 1988) ch 1.

¹¹³ See Free TV Commercials Advice, *Classification Handbook: An Overview of Classification Procedures Incorporating the A-Z Television Production Checklist* (January 2010) Commercials Advice Division <http://www.freetv.com.au/content_common/pg-cad-procedures-guide.seo>.

¹¹⁴ Michele Roberts et al, 'Compliance with Children's Television Food Advertising Regulations in Australia' (2012) 12(1) *BMC Public Health* 846.

¹¹⁵ Bryne Purchase, 'The Political Economy of Voluntary Codes' in Kernaghan Webb (ed), *Voluntary Codes: Private Governance, the Public Interest and Innovation* (Carleton Research Unit for Innovation, Science and Environment, Carleton University, 2004) 77, 82.

associations face in maintaining actual and apparent independence, effective self-regulation relies on structuring regulatory tasks so that there is a degree of separation between the industry creating the scheme and the body that administers it.¹¹⁶ As described in Chapter 7, the AFGC's administration of the scheme is almost entirely industry based, with few formal processes for incorporating external input in the codes' governance processes.¹¹⁷ Only the ASB and the independent review provide some form of outside influence on the scheme's operation; apart from this, the codes do not establish structures for consulting or engaging with external stakeholders in routine administrative and monitoring processes.¹¹⁸ Without external involvement, the public is unlikely to accept the scheme as a credible form of self-regulation, nor is the scheme likely to give voice to public health concerns.

Management of the ABAC Scheme

Similar issues arise in the governance of the ABAC Scheme, which is administered by the ABAC Management Committee.¹¹⁹ As mentioned in previous chapters, the Committee originally comprised the executive directors of the main alcohol industry trade associations, as well as a member of the advertising industry's representative body.¹²⁰ Following the 2003 review of the scheme, the alcohol industry included a representative from the federal Department of Health on the Management Committee.¹²¹ It also appointed a public health representative to the ABAC Adjudication Panel, which previously comprised only the Chief Adjudicator, and representatives with media or marketing backgrounds.¹²² Despite these changes, governance of the scheme is still industry-based and membership of the Management Committee and the Adjudication Panel is unequally weighted in favour of the industry.¹²³

Chapter 10 describes how alcohol industry 'quasi-regulation' points to the dangers of incorporating external interests in schemes that are led by industry actors. In these circumstances, external representation is likely to be tokenistic, rather than representing a

¹¹⁶ See, e.g., Australian Competition and Consumer Commission, above n 1, 7-9.

¹¹⁷ See also S Prakash Sethi and Olga Emelianova, 'A Failed Strategy of Using Voluntary Codes of Conduct by the Global Mining Industry' (2006) 6(3) *Corporate Governance* 226, 236.

¹¹⁸ Taskforce on Industry Self-Regulation, above 7, 63; Belinda Reeve 'Private Governance, Public Purpose? Assessing Transparency and Accountability in Self-Regulation of Food Advertising to Children' (2013) 10(2) *Journal of Bioethical Inquiry* 149.

¹¹⁹ The ABAC Scheme Limited, *The ABAC Scheme: Rules and Procedures*, above n 66, 1.

¹²⁰ National Committee for the Review of Alcohol Advertising, above n 65, 12-13.

¹²¹ The ABAC Scheme Limited, *The ABAC Scheme: Rules and Procedures*, above n 66, 1.

¹²² National Committee for the Review of Alcohol Advertising, above n 65, 13-14.

¹²³ Simone Pettigrew, Rebecca Johnson and Mike Daube, 'Introducing and Applying a New Australian Alcohol Advertising Code' (2012) 13(1) *Journal of Public Affairs* 72.

balance of interests in the scheme's administration. Accordingly, the example of the ABAC Scheme suggests the need for independent administration of the food industry codes. Below, I discuss other grounds for external involvement in food and alcohol industry self-regulation, namely the industries' rationale for adopting voluntary programs and their economic incentives to self-regulate.

5. Industry rationales for adopting self-regulation

The food industry

Industries self-regulate in response to changed market conditions, pressure from outside forces, catastrophic events, dwindling natural resources and broad socioeconomic and political trends.¹²⁴ The food industry has been placed on the defensive by claims that it 'seduces children into a lifestyle of unhealthy eating, infiltrates schools and other social institutions, buys loyalty from scientists and pressures administration officials into accepting weak and ineffective nutrition policies'.¹²⁵ The transnational companies that dominate the industry are particularly vulnerable to consumer, public health and NGO demands, given that their business strategy is based on the creation of high profile brands.¹²⁶ This allows NGOs to direct boycotts and protests at highly visible companies like McDonald's and Starbucks, creating negative publicity about their marketing practices, as well as their approach to food safety and quality, environmental protection, labour rights and animal welfare.¹²⁷ Thus, the industry faces the threat that regulation or legislation could restrict advertising to children, as well as sales in schools, nutrition labelling and product size.¹²⁸

¹²⁴ See Marc Schneiburg and Tim Bartley, 'Regulating American Industries: Markets, Politics and the Institutional Determinants of Fire Insurance Regulation' (2001) 107(1) *American Journal of Sociology* 101; Marc Schneiburg and Tim Bartley, 'Organisations, Regulation and Economic Behaviour: Regulatory Dynamics and Forms from the Nineteenth to Twenty-First Century' (2008) 4 *Annual Review of Law and Social Science* 31; Lisa L Sharma, Stephen P Teret and Kelly D Brownell, 'The Food Industry and Self-Regulation: Standards to Promote Success and to Avoid Public Health Failures' (2010) 100(2) *American Journal of Public Health* 240.

¹²⁵ Brownell and Warner, above n 27, 262-263. See also Nestle, above n 13; Brownell and Horgen, above n 33.

¹²⁶ Busch and Bain, above n 28, 332-333. See also Naomi Klein, *No Logo: No Space, No Choice, No Jobs* (Picador, 2002).

¹²⁷ *Ibid.*

¹²⁸ Brownell and Warner, above n 27, 260; Laurian J Unnevehr and Evelina Jagmanaite, 'Getting Rid of Trans Fats in the US Diet: Policies, Incentives and Progress' (2008) 33(6) *Food Policy* 497; Kate Carey, 'Heart Foundation Calls for Mandatory Salt and Saturated Fat Levels in Processed Foods', *Australian Food News* (online) 12 November 2012 <<http://www.ausfoodnews.com.au/2012/11/12/heart-foundation-calls-for-mandatory-salt-and-saturated-fat-levels-in-processed-foods.html>>; Gary Sacks, 'Denmark Scraps Fat Tax in Another Big Food Victory', *The Conversation* (online) 17 November 2012 <<http://theconversation.com/denmark-scraps-fat-tax-in-another-big-food-victory-10689>>; Conal Urquhart, 'Childhood Obesity: Jeremy Hunt Threatens Food Industry with Legislation', *The Guardian* (online) 6 January 2013 <<http://www.guardian.co.uk/society/2013/jan/05/childhood-obesity-fatty-sugary-foods>>; Lawrence O

The development of self-regulatory schemes by the food industry can be understood as a response to the business threats posed by negative public attitudes and the prospect of government regulation.¹²⁹ The creation of advertising codes by the Australian food industry appears to be no exception. For example, a representative of the AFGC described the RCMI as a response to growing community concerns about food advertising to children and its link with obesity. A senior executive at the AFGC said that pressure from government also provided impetus for a self-regulatory scheme, as did international developments:

... probably going back... to the year 2000... the issue of childhood obesity became prominent, both in terms of it being a public health concern, but also highlighted in the media.... The Government responded by asking the Australian Communication and Media Authority... to review the *Children's Television Standards* [2005] ...The review...concluded that there was no strong causal evidence between the levels of advertising to children and childhood obesity... But... it did say that the industry should be mindful of community concerns... So this organisation turned its mind to [whether there] could be a role for some form of voluntary code to help address the... community issues... the advertising industry was already thinking about some sort of pledge, because this issue had been bubbling along overseas as well, and some of the companies overseas had formed a pledge... voluntarily restricting advertising to children...

Chapter 9 discusses the reasons given by individual companies for joining the codes. In interviews, company representatives talked about the importance of improving the company's reputation and that of the industry as a whole. They discussed other motivations for self-regulation, including the creation of a level playing field, and an ethical responsibility to advertise to children in a way that encouraged healthy eating.¹³⁰

Martin Caraher and John Coveney describe the food industry's quick response to consumer trends favouring local, fresh and organic foods, as well as concerns about the environment, food production processes and genetically modified food.¹³¹ However, they argue that these responses are not based on promoting public health, but on the impact of consumer concerns on sales and profits.¹³² Self-regulation allows the industry to present itself as more responsive to consumers than government bodies, but in doing so, 'the private sector hopes to remove itself from the front line of any negative publicity that emerges concerning food safety,

Gostin, 'Banning Large Sodas is Legal and Smart', *CNN* (online) 13 March 2013
<<http://edition.cnn.com/2013/03/13/opinion/gostin-soda-ban>>.

¹²⁹ Sharma, Teret and Brownell, above n 165, 243.

¹³⁰ See also Tymms, above n 5, 34-35.

¹³¹ Martin Caraher and John Coveney, 'Public Health Nutrition and Food Policy' (2004) 7(5) *Public Health Nutrition* 591, 595.

¹³² *Ibid.*

environmental or other food-related crises'.¹³³ A similar conclusion can be drawn about the RCMI and QSRI – that the industry created the codes to appease consumer concerns, stave off government regulation and enhance the industry's reputation, rather than to improve the marketing environment or to change children's consumption behaviours.¹³⁴ This conclusion is strengthened by the fact that the codes do not, in fact, reduce children's exposure to unhealthy food advertising and for that reason are unlikely to improve children's diets or nutrition.¹³⁵

The alcohol industry

Alcohol industry interviewees described a complex range of factors that shaped the development of the ABAC and compliance with its terms. In particular, they spoke of a desire to protect credibility and reputation at both company and industry levels. Further, participants said that alcohol advertising had to accord with community views on appropriate advertising, if the industry was to maintain its social licence to operate. This related to the fact that alcohol is 'no ordinary commodity', and significant health and social harms result from its misuse.¹³⁶ For example, a representative of one alcohol manufacturers' trade association said that:

I look at the... ABAC Scheme, and we rightly say that it does lead the world... we're an industry that's always been... about partnerships and working with the government and the community and respecting community in this space..... ABAC's... been built around... rules... about the model's age you can actually use and the target audience... and issues around the appeal of alcohol... whether it has any impact upon performance... those are very good things that reflect... alcohol.... having a legitimate place [in society]... you have to maintain a pretty clean nose if you're going to maintain your legitimacy.

As with food industry self-regulation, the alcohol industry's rationale for creating the ABAC stemmed from a mixture of economic and ethical motivations, government, consumer and NGO pressure, and a related concern for protecting the legitimacy and credibility of the industry. Yet self-regulation that is primarily designed to address reputational concerns may be less effective compared to schemes that aim to protect physical resources upon which the

¹³³ Busch and Bain, above n 28, 243.

¹³⁴ See also Sharma, Teret and Brownell, above n 165, 243.

¹³⁵ See King et al, 'Industry Self-Regulation of Television Food Advertising: Responsible or Responsive?' above n 36; Lana A Hebden et al, 'Advertising of Fast-Food to Children on Australian Television: The Impact of Industry Self-Regulation' (2011) 195(1) *Medical Journal of Australia* 20; Lesley King et al, 'Building the Case for Independent Monitoring of Food Advertising on Australian Television' (2012) (*FirstView Article*) *Public Health Nutrition* 1 <<http://journals.cambridge.org/action/displayAbstract?fromPage=online&aid=8706977>>.

¹³⁶ Barbor et al, above n 52.

industry depends, for example the sustainability of fisheries stocks.¹³⁷ Stronger forms of self-regulation would also seem more likely where there is a clear link between the industry's products and significant harms to public health.¹³⁸ However, the alcohol, food (and tobacco) industries deny any connection between advertising and increased consumption of their products.¹³⁹ Further, alcohol and tobacco companies joined voluntary codes while continuing with marketing practices that target and appeal to young people.¹⁴⁰ A similar pattern is apparent in the food industry, leading researchers to draw the conclusion that voluntary codes are little more than cynical window dressing.¹⁴¹ Successful self-regulation seems to require a clear connection between an industry's activities or products and harm to the public. Since the food industry does not share the conviction that its products contribute to obesity there is unlikely to be any commitment or incentive to moderate advertising to children.

6. Economic incentives for self-regulation

The food industry

Self-regulation presents a series of economic risks and benefits for those participating in the scheme. Accordingly, companies must perceive that the benefits of self-regulating outweigh its costs if they are to join a scheme and comply with its standards.¹⁴² Chapter 9 explains how RCMI and QSRI participants found the codes costly to implement.¹⁴³ However, Big Food faces changing public perceptions about the appropriateness of advertising food products to children and increased scrutiny of its business practices, as well as growing demand for

¹³⁷ See Sharma, Teret and Brownell, above n 165, 243; Andrew A King and Michael J Lenox, 'Industry Self-Regulation Without Sanctions: The Chemical Industry's Responsible Care Program' (2000) 43(4) *Academy of Management Journal* 698; Tavis Potts and Marcus Haward, 'International Trade, Eco-Labeling, and Sustainable Fisheries - Recent Issues, Concepts and Practices' (2007) 9(1) *Environment, Development and Sustainability* 91.

¹³⁸ For example, the nuclear power and chemical industries created self-regulatory schemes following catastrophic disasters, where the harm from the industries' products was incontrovertible. See Gunningham and Rees, above n 1; Rees, *Hostages of Each Other*, above n 1; Rees, 'Development of Communitarian Regulation in the Chemical Industry', above 110; Gunningham above n 149.

¹³⁹ See, e.g., Australian Food and Grocery Council, *Food and Beverage Advertising to Children: Activity Report* (2012), above n 136, 4; S M Carter, 'Cooperation and Control: The Tobacco Institute of Australia' (2003) 12(Suppl III) *Tobacco Control* iii54; Laura Bond, Mike Daube and Tanya Chikritzhs, 'Selling Addictions: Similarities in Approaches Between Big Tobacco and Big Booze' (2010) 3(6) *Australasian Medical Journal* 326, 327.

¹⁴⁰ See, e.g., Bond, Daube and Chikritzhs, above n 180; Simon F Chapman, 'A David and Goliath Story: Tobacco Advertising and Self-Regulation in Australia' (1980) 281(6249) *British Medical Journal* 1187; Gerard Hastings et al, 'Failure of Self-Regulation of UK Alcohol Advertising' (2010) 370 *British Medical Journal* 1102.

¹⁴¹ See Sharma, Teret and Brownell, above n 165, 245.

¹⁴² Purchase, above n 156, 87.

¹⁴³ See also Tymms, above n 5, 38.

healthier products.¹⁴⁴ These trends may enhance the economic benefits of joining advertising codes, particularly where companies invest in the development of healthier products and promote themselves as supporting healthy eating. Self-regulation could also have other more indirect or diffuse benefits for participants. For example, two companies told the independent reviewer that while there were few economic incentives for joining the RCMI, self-regulation facilitated a more cooperative approach to issues faced by the industry.¹⁴⁵ Chapter 9 describes these more intangible benefits in further detail, including the perception that self-regulation improved corporate reputations and credibility in the eyes of consumers and the public.

We can question whether the profits from improved reputation outweigh the losses that companies incur from accepting significant restrictions on advertising that targets or appeals to children.¹⁴⁶ Food companies have a legal obligation to increase their sales and maximise returns to shareholders.¹⁴⁷ However, the Australian domestic market has reached maturity and its growth depends upon encouraging consumers to purchase products with higher profit margins.¹⁴⁸ The industry's most profitable products are highly processed snack foods, cereals and 'convenience foods' that largely consist of refined starch, concentrated sugars and low-quality fats, as well as sugary beverages.¹⁴⁹ Although there is growing demand for healthier options, this leads to the expansion of companies' product portfolios rather than reduced production of unhealthy foods and beverages.¹⁵⁰ Accordingly, while some advertising may promote responsible consumption and physical activity, '[a]dvice to eat less often, eat foods

¹⁴⁴ Ibid 34-35. See also Australian Food and Grocery Council, *State of the Industry 2012*, above n 15, 51-52; Blewett et al, above n 135, 18-19; David Burch and Geoffrey Lawrence, 'The "Wellness" Phenomenon: Implications for Global Agri-Food Systems' in Geoffrey Lawrence, Kristen Lyons and Tabatha Wallington (eds), *Food Security, Nutrition and Sustainability* (Earthscan, 2010) 175; John Kearney, 'Food Consumption Trends and Drivers' (2010) 365(1554) *Philosophical Transactions of the Royal Society* 2793; Department of Agriculture, Fisheries and Forestry, *National Food Plan, Our Food Future* (Department of Agriculture, Fisheries and Forestry, 2013) 24 <<http://www.daff.gov.au/nationalfoodplan>>.

¹⁴⁵ Tymms, above n 5, 35.

¹⁴⁶ Sarah MacKay, 'Food Advertising and Obesity in Australia: To What Extent Can Self-Regulation Protect the Interests of Children?' (2009) 35 *Monash University Law Review* 118, 128.

¹⁴⁷ See Ludwig and Nestle, above n 29, 1809; Kawther Hashem, Christine Haigh and Charlie Powell, *The Irresponsibility Deal? Why the Government's Responsibility Deal is Better for the Food Industry than Public Health* (2011) 19 Sustain <www.childrensfood.org.uk>; Anna B Gilmore, Emily Savell and Jeff Collin, 'Public Health, Corporations and the New Responsibility Deal: Promoting Partnerships with Vectors of Disease?' (2011) 33(1) *Journal of Public Health* 2.

¹⁴⁸ Department of Agriculture, Forestry and Fisheries, 'Australian Agriculture and Food Sector Stocktake,' above n 18, 75. The same situation applies in the US, where the industry provides roughly twice the population's daily energy needs. See Ludwig and Nestle, above n 29, 1809.

¹⁴⁹ Ludwig and Nestle, above n 29, 1809. See also Stuckler and Nestle, above n 27; Lyson and Raymer, above n 121.

¹⁵⁰ Brownell and Warner, above n 27, 283; Ludwig and Nestle, above n 29, 1809; Lyson and Raymer, above n 121, 203.

in smaller portions and avoid high-calorie foods of low-nutritional quality undermines the fundamental business model of many companies'.¹⁵¹

Further, it is unlikely that either parents or children would be aware of the RCMI and QSRI and consider the codes' membership when making choices about what foods and beverages to buy.¹⁵² There is evidence that most consumers make food purchasing decisions according to price, rather than health considerations, suggesting that compliance with advertising self-regulation is not a significant influence on consumers' purchasing decisions.¹⁵³ I interviewed several representatives from public health organisations who said that this was a fundamental limitation of food advertising self-regulation – that there was simply no economic basis for companies to modify their advertising practices. For example, one public health advocate said that:

... on a general level... self-regulation's just unlikely to work given the impact that limiting advertising could have on profit margins, so they're just not motivated... to really bring about effective restrictions if that would mean they can't market their foods in the way that they want to.

As David Ludwig and Marion Nestle remark, visionary CEOs and enlightened companies exist within the food industry.¹⁵⁴ Indeed, Chapter 9 finds that some Australian companies seem genuinely committed to responsible marketing practices. But for the majority of the industry it is more profitable to engage in marketing practices that encourage children to eat unhealthy products – which self-regulation should aim to prevent.¹⁵⁵ It appears that the only real economic grounds for advertising restrictions are reputation protection and avoiding government regulation.¹⁵⁶ The threat of having advertising completely banned may provide a commercial incentive to self-regulate.¹⁵⁷ However, as I will discuss in Chapter 11, there is little credible threat of government regulation of food advertising in Australia. This may help to explain why Australia currently has, in the RCMI and QSRI, two weak, voluntary regimes

¹⁵¹ Ludwig and Nestle, above n 29, 1809.

¹⁵² MacKay, above n 187, 127.

¹⁵³ Paul R Ward et al, 'The Social Determinants of Food Purchasing Practices: Who Chooses Price-before-Health, Taste-before-Price or Organic Foods in Australia?' (2012) 3(4) *Food and Nutrition Sciences* 461.

¹⁵⁴ Ludwig and Nestle, above n 29, 1810.

¹⁵⁵ MacKay, above n 187, 127.

¹⁵⁶ *Ibid* 127-128.

¹⁵⁷ See Tymms, above n 5, 62, where some companies reported that the threat of having advertising prohibited altogether was a commercially significant disincentive to finding loopholes in self-regulatory requirements. See also Mackay, above n 187, 127-128; Michael Blakeney and Shenagh Barnes, 'Industry Self-Regulation: An Alternative to Deregulation? Advertising - A Case Study' (1982) 5 *University of New South Wales Law Journal* 133, 145.

that make few demands on signatories conduct and achieve little in terms of moderating children's exposure to unhealthy food advertising.

The alcohol industry

Public health interviewees raised similar concerns about the regulation of alcohol advertising that targets young people. Alcohol marketing forms a critical part of producers' strategies to gain market share and maximise alcohol consumption, in order to provide the greatest return to shareholders.¹⁵⁸ This is particularly the case as alcohol production networks become increasingly globalised, with alcohol marketing taking place on an international scale.¹⁵⁹ Alcohol manufacturers advertise to young audiences as a means to recruit new drinkers and establish loyalty to the company's brand.¹⁶⁰ They associate their brands with youth markets through promotions using new media, by targeting university students and by sponsoring music and cultural events that are popular with young people.¹⁶¹ Public health participants said that there was a conflict of interest between meaningful restrictions on the content and placement of alcohol advertisements and the industry's economic motivation for advertising to young people. For example, the representative of one public health organisation said that:

The track record suggests that if you do leave [regulation] to the industry they won't impose meaningful restrictions, and...it's because that would actually harm their bottom line and that's really what their... primary goal [is], and if you're really not affecting the drinking patterns or preferences of adults, then you have to attract a new market or you have to seek new drinkers, and that's where...the real tension lies, that if you're trusting them to self-regulate, knowing full well that they have to target this new market, the chances are that that's not going to happen to the extent that it would give any public health gains.

Food and alcohol companies may be willing to accept some restrictions on advertising that directly targets children. However, they are unlikely to accept broader ranging restrictions that affect their ability to market products to an adult and youth audience – yet this is necessary if we are to reduce children's exposure to food and alcohol advertising.¹⁶² The same public health interviewee quoted above summed up this problem in relation to alcohol advertising restrictions:

¹⁵⁸ Wilson et al, above n 71; Geoffrey Munro and Johanna de Wever, 'Culture Clash: Alcohol Marketing and Public Health Aspirations' (2008) 27(2) *Drug and Alcohol Review* 204, 205.

¹⁵⁹ Jernigan, above n 52, 9.

¹⁶⁰ Hastings et al, above n 181; Sally Casswell, 'Alcohol Brands in Young Peoples' Everyday Lives: New Developments in Marketing' (2004) 39(6) *Alcohol and Alcoholism* 471, 472-473.

¹⁶¹ Ibid.

¹⁶² C Hawkes, 'Self-Regulation of Food Advertising: What It Can, Could and Cannot Do to Discourage Unhealthy Eating Habits Among Children' (2005) 30(4) *Nutrition Bulletin* 374, 380-381.

... the difficulty with exposure levels is that you would have to impinge on the right of people over 25 or over 18 to view alcohol advertising in order to preserve the rights of the more vulnerable in society, which is the under 25s or under 18s... But...from a public health perspective, the preference is to...impose a slight burden on the people who are better able to protect themselves than to risk the health of people who aren't able to protect themselves to the same extent.

For private regulation to serve a public purpose it must represent a 'win-win' situation for both consumers and industry actors, i.e. both the public and industry must have an interest in its success.¹⁶³ However, in the case of food and alcohol self-regulation, there is a fundamental conflict between companies' economic imperative to advertise their products to a wide audience and the public health goal of reducing young people's exposure to advertising. The lack of economic incentives for compliance has two important implications for food and alcohol advertising codes. First, it will be difficult to attract new members to codes, limiting the extent to which self-regulation can achieve broad coverage of the relevant industry. Second, it may be problematic to strengthen the standards contained in the codes, as this will simply increase the costs of compliance, placing participants at a greater disadvantage to non-members. In these circumstances, there is a strong argument that some sort of external pressure will be required to deliver a more effective food advertising scheme.¹⁶⁴

7. Conclusion

This chapter described the institutional determinants of successful self-regulation, and then evaluated the extent to which they apply in the food and alcohol industries. Increased consolidation and concentration in the food industry enhances its capacity to self-regulate, as does the creation of governance structures and processes that support voluntary initiatives. However, there are significant industry-level constraints on Australian food industry self-regulation. First, the RCMI and QSRI do not apply to all actors in the food industry, particularly the large supermarkets that produce an increasing amount of advertising and have a growing influence on individual eating habits. Second, food advertising restrictions are based on a distinction between healthy and less healthy products, making regulation a complex exercise.

A third concern is the AFGC's administration of the food industry's scheme. The AFGC is a relatively strong trade association, particularly in comparison to the alcohol industry bodies.

¹⁶³ Gunningham and Rees, above n 1, 390; Neil Gunningham, 'Codes of Practice: The Australian Experience' in Kernaghan Webb (ed), *Voluntary Codes: Private Governance, the Public Interest and Innovation* (Carleton Research Unit for Innovation, Science and Environment, Carleton University, 2004) 317, 328.

¹⁶⁴ Gunningham and Rees, above n 1, 394.

However, the absence of strong enforcement makes the RCMI and QSRI vulnerable to free-riding, potentially undermining the codes' continuing operation. Further, administration of the scheme is not independent, diminishing the scheme's credibility and legitimacy in the eyes of the public. The governance processes attached to the ABAC speak to the dangers of industry-based administration, namely that self-regulation will never be perceived as credible by public health groups, even when industry attempts to open up the scheme to outside influences (which has not yet occurred with the RCMI and QSRI).

The most fundamental problems with food industry self-regulation relate to the industry's rationale for creating the scheme and the economic incentives for compliance. The drivers of food industry self-regulation are complex, but mainly appear to be addressing community and government concerns about food advertising and obesity, with the overall goal of protecting the industry's reputation. Self-regulation may enhance the public image of food and alcohol companies, yet the benefits of a genuinely demanding scheme are unlikely to outweigh the costs of marketing restrictions that would affect companies' ability to reach an adult audience. However, reducing children's exposure necessarily implies constraints on adults' exposure to advertising in programs with substantial child and adult audiences – something that is likely to be unacceptable to the food industry.

The following chapter will build on this position by examining the steps taken by individual food and alcohol companies to implement advertising self-regulation, within the broader context of food and alcohol industry corporate social responsibility strategies. Taken together, these chapters demonstrate that industry self-regulation is inherently limited as a public health measure, as the food industry has little incentive to accept significant restrictions on its advertising practices. This argument lays the foundation for government intervention in food industry self-regulation, which I argue is necessary if the scheme is to offer children adequate protection from unhealthy food advertising.

CHAPTER 9

Corporate practices and the implementation of self-regulation

The success of self-regulation depends upon whether companies internalise the social norms contained in voluntary codes.¹ Accordingly, this chapter describes how and why food and alcohol companies comply with voluntary advertising initiatives (to the extent that they do). It draws upon interviews conducted with representatives of signatories to the RCMI, QSRI and ABAC. I interviewed spokespeople from six Australian food manufacturers (out of 17 RCMI participants), one quick serve restaurant chain (out of seven QSRI participants) and four alcohol manufacturers (out of approximately 315 ABAC participants).² Interviewees have been given pseudonyms to protect their anonymity. The chapter also analyses selected food and alcohol company corporate social responsibility documents, as well as findings from the independent review of food industry self-regulation, published in 2012.³ I describe how transnational food and alcohol companies have attempted to meet public demands for more responsible marketing practices through their corporate social responsibility (CSR) practices.⁴ Then I describe the reasons that Australian food and alcohol companies give for adopting advertising self-regulation (foreshadowed in Chapter 8) and how they integrated code requirements into their marketing activities.

¹ See, e.g., Christine Parker, *The Open Corporation: Effective Self-Regulation and Democracy* (Cambridge University Press, 2002); Christine Parker and Sharon Gilad, 'Internal Corporate Compliance Management Systems: Structure, Culture and Agency' in Christine Parker and Vibeke Lehmann Nielsen (eds), *Explaining Compliance: Business Responses to Regulation* (Edward Elgar, 2011) 170.

² Chapter 8 explained that although there are seven participants to the QSRI, this represents seven restaurant chains that are owned by four large companies. Thus, in practice there are only four participants to the code. Participants to the ABAC are the member companies of the three alcohol trade associations, the Distilled Spirits Industry Council of Australia (with 10 members), the Brewers Association of Australia and New Zealand (three members), and the Winemakers Federation of Australia, as well as Woolworths. The Winemakers' Federation does not make its membership publicly available, but when I contacted the organisation they gave me an approximate figure of 300 members (email from Yvonne McClaren to Belinda Reeve, 18 July 2013). See also Brewers Association of Australia and New Zealand, *About Us* (undated) <<http://www.brewers.org.au/about-us/>>; DSICA, *Members of DSICA* (2011) <http://www.dsica.com.au/content/detail/members_of_dsica>.

³ Susannah Tymms, 'Responsible Advertising to Children: An Independent Review of the Australian Food and Beverage Industry Self-Regulatory Codes' (AGFC, October 2012) <<http://www.afgc.org.au/industry-codes/advertising-to-children/rcmi/rcmi-reports-2009.html>>.

⁴ CSR involves firms' recognition of their ethical, legal, social and environmental responsibilities to society in addition to their fiduciary duties to shareholders. See Lois Dorfman et al, 'Soda and Tobacco Industry Corporate Social Responsibility Campaigns: How Do They Compare?' (2012) 9(6) *PLoS Medicine* e1001241, 1-2 <<http://www.plosmedicine.org/article/info%3Adoi%2F10.1371%2Fjournal.pmed.1001241>>. See also Archie B Carroll, 'A Three-Dimensional Conceptual Model of Corporate Performance' (1979) 4(4) *The Academy of Management Review* 497; Sun Young Lee and Craig E Carroll, 'The Emergence, Variation and Evolution of Corporate Social Responsibility in the Public Sphere, 1980-2004: The Exposure of Firms to Public Debate' (2011) 104(1) *Journal of Business Ethics* 115.

I present the paradox that some companies are adhering tightly to voluntary initiatives, yet self-regulation has had little impact on children's overall exposure to food and alcohol advertising. One explanation for the codes' lack of impact lies in their weak substantive standards. While this is not fatal to the success of self-regulation, I conclude that food companies have few incentives to adopt the more demanding restrictions that could significantly improve the food marketing environment.

1. Corporate social responsibility in the transnational food and alcohol industries

Big Food faces increasing pressure from consumers and public health advocates troubled by rising rates of obesity, as well as the threat of legislative measures such as food taxes, advertising bans and mandatory product labelling.⁵ In response to these pressures, large food companies began introducing CSR measures from the late 1990s, with these policies becoming increasingly sophisticated as concerns about obesity rose.⁶ Transnational firms such as Nestlé, Kellogg's and McDonald's have implemented multi-pronged strategies to develop and market healthier products, operating alongside more traditional labour, environment and sustainability programs.⁷

Big Food has supplemented company-level strategies with national and regional advertising pledges, public-private partnerships and other voluntary initiatives with obesity prevention objectives.⁸ For example, the *International Food and Beverage Alliance* (IFBA) brings

⁵ See, e.g., Gary Sacks, 'Denmark Scraps Fat Tax in Another Big Food Victory', *The Conversation* (online) 17 November 2012 <<http://theconversation.com/denmark-scraps-fat-tax-in-another-big-food-victory-10689>>; Conal Urquhart, 'Childhood Obesity: Jeremy Hunt Threatens Food Industry with Legislation', *The Guardian* (online) 6 January 2013 <<http://www.guardian.co.uk/society/2013/jan/05/childhood-obesity-fatty-sugary-foods>>; Lawrence O Gostin, 'Banning Large Sodas is Legal and Smart', *CNN* (online) 13 March 2013 <<http://edition.cnn.com/2013/03/13/opinion/gostin-soda-ban>>.

⁶ Consumers International, 'Left Wanting More: Food Company Policies on Marketing to Children' (Consumers International, March 2009) 8 <http://www.consumersinternational.org/news-and-media/resource-zone/left-wanting-more-a-survey-of-food-companies-policies-on-marketing-to-children#.UbbB3h9-_cs>. See also Tim Lang, Geof Rayner and Elizabeth Kaelin, *The Food Industry, Diet, Physical Activity and Health: A Review of Reported Commitments and Practice of 25 of the World's Largest Food Companies* (March 2006) Centre for Food Policy, City University <<http://www.city.ac.uk/arts-social-sciences/sociology/research/centre-for-food-policy/publications>>.

⁷ See, e.g., Dorfman et al, above n 4; Derek Yach et al, 'The Role and Challenges of the Food Industry in Addressing Chronic Disease' (2010) 6 *Globalisation and Health* 10 <<http://www.biomedcentral.com/content/pdf/1744-8603-6-10.pdf>>; Tara Acharya et al, 'The Current and Future Role of the Food Industry in the Prevention and Control of Chronic Diseases: The Case of PepsiCo' in David Stuckler and Karen Siegal (eds), *Sick Societies: Responding to the Global Challenges of Chronic Disease* (Oxford University Press, 2011) 187; Michele Simon, 'PepsiCo and Public Health: Is the Nation's Largest Food Company a Model of Corporate Responsibility or Master of Public Relations?' (2012) 15 *CUNY Law Review* 101.

⁸ See, e.g., Ecode European Network, *Tackling Obesity and Non-Communicable Diseases* (undated) <<http://www.epode-european-network.com/en/background/tackling-obesity-and-ncds.html>>; Vivica I Kraak and Mary Story, 'A Public Health Perspective on Healthy Lifestyles and Public-Private Partnerships for Global

together multinational food and beverage companies to make progress towards WHO's *Global Strategy on Diet, Physical Activity and Health*.⁹ It has commitments on product reformulation; providing nutrition information to consumers; globally extending initiatives on responsible advertising to children; raising awareness on the need for balanced diets and exercise; and creating public-private partnerships that support the *Global Strategy*.¹⁰

The picture among RCMI and QSRI participants is much the same as it is internationally because the majority of signatories are subsidiaries, franchisees or the Australian arm of a larger multinational company. Participants' parent companies comprise some of the world's largest and best-known food and beverage manufacturers and quick service restaurants, including The Coca-Cola Company, PepsiCo, Kraft, Kellogg's, Nestlé, Unilever and McDonald's. As with their parent companies, signatories have adopted complex CSR strategies that include responsible marketing policies, product reformulation and nutrition information requirements. By way of example, Box 2 summarises the *Nutrition Policy* of Fonterra, a global, cooperatively-owned company that produces milk and dairy products, and participates in the RCMI.¹¹

Childhood Obesity Prevention' (2010) 110(2) *Journal of the American Dietetic Association* 192; C Hawkes and T Lobstein, 'Regulating the Commercial Promotion of Food to Children: A Survey of Actions Worldwide' (2011) 6(2) *International Journal of Paediatric Obesity* 83.

⁹ International Food and Beverage Alliance, *Our Commitments* (undated) <<https://www.ifballiance.org/our-commitments.html>>.

¹⁰ Ibid.

¹¹ Fonterra, *Company Overview* (2013) <<http://www.fonterra.com/global/en/About/Company+Overview>>.

Box 2. Fonterra Brands Nutrition Policy

Product Composition	<ul style="list-style-type: none"> • Use minimum amounts of sugar and salt in all products without affecting taste and safety. • Evaluate fat levels in all products, appropriate for the nutritional status and age of the target consumer.
Marketing practices	<ul style="list-style-type: none"> • Market foods in the context of a healthy lifestyle that includes a healthy eating plan and regular physical activity. • Act responsibly when marketing products for children.
Consumer information/labelling	<ul style="list-style-type: none"> • Help consumers to make informed product choices by providing information on labels that is easy to read and understand. • Ensure nutrition and health messages are an accurate assessment of the weight of scientific evidence.
Research and innovation	<ul style="list-style-type: none"> • Develop a portfolio of food products that are healthy and nutritious. • Support research into nutritional science for product innovation. • Ensure all claims are scientifically substantiated.
Regulations	<ul style="list-style-type: none"> • Actively work with key stakeholders to help develop food regulations • Ensure compliance with existing national regulations, food and nutrition policies and guidelines.
Employees/lifestyle action	<ul style="list-style-type: none"> • Provide a workplace environment that encourages healthy choices. • Establish and promote workplace schemes that encourage health and fitness among employees and families.

To support their CSR programs, RCMI and QSRI signatories participate in a range of voluntary initiatives. In addition to advertising pledges, these include the Australian division of the World Action on Salt and Health (AWASH),¹² the Food and Health Dialogue¹³ and the Daily Intake Guide Labelling scheme.¹⁴ There are close connections between the national and international activities of Big Food, with national programs often forming one component of companies' global CSR programs. For example, McDonald's cites the QSRI as an example of the company implementing its internal guidelines on marketing to children on a worldwide basis. The McDonald's corporate website's page on 'sustainability' states that McDonald's Australia 'took a leadership role in the initiation, development and introduction' of the QSRI.¹⁵ Accordingly, the RCMI and QSRI need to be considered within the context of food industry global governance efforts.¹⁶

¹² AWASH - Australian Division of World Action on Salt and Health, *Drop The Salt! Campaign* (undated) <<http://www.awash.org.au/drop-the-salt-campaign/>>.

¹³ Department of Health and Aging, *Welcome to the Food and Health Dialogue Website* (23 May 2012) Australian Government <<http://www.foodhealthdialogue.gov.au/internet/foodandhealth/publishing.nsf>>.

¹⁴ Australian Food and Grocery Council, *Daily Intake Guide: Healthy Eating Made Easy* (2011) <<http://www.mydailyintake.net/>>.

¹⁵ McDonald's *Leading by Example Global Advertising Campaigns* (2013) <http://www.aboutmcdonalds.com/mcd/sustainability/library/best_practices/nutrition_and_well_being/leading_by_example.html>.

¹⁶ See also David Vogel, 'Private Global Business Regulation' (2008) 11 *Annual Review of Political Science* 261.

Alcohol manufacturers have also created complex CSR strategies in response to public health concerns.¹⁷ In 2005, 13 out of 24 global alcohol corporations had CSR policies or social reports on their websites,¹⁸ although the quality of CSR information varied significantly between these firms.¹⁹ Alcohol company strategies acknowledge the health risks of alcohol misuse, while promoting the benefits of moderate consumption and advocating for responsible drinking.²⁰ These programs also include philanthropy; partnering with government, the police and retailers in responsible drinking campaigns; product reformulation; responsible marketing policies; and disseminating information to consumers.²¹

Australian alcohol manufacturers take a similar approach, given that many local wine, spirit and beer manufacturers are owned by larger international companies.²² For example, Lion is an Australian food and beverage company that produces dairy products and both alcoholic and non-alcoholic drinks.²³ It is owned by Kirin Holdings, a large Japanese company that originally operated as a brewery.²⁴ Since it merged with National Foods in 2009, Lion is also a signatory to the RCMI.²⁵ The Lion 2011 Sustainability Report sets out the company's approach to 'growing sociability and wellbeing'.²⁶ Under the heading 'sustainable products', the company lists product development and reformulation, including the expansion of its alcoholic beverage range to include lower and no-alcohol beverages.²⁷ The report also stresses the importance of responsible marketing, as well as providing consumers with information to enable them to make 'healthy dietary and lifestyle choices'.²⁸ Finally,

¹⁷ Sally Casswell, 'Alcohol Industry and Alcohol Policy - The Challenge Ahead' (2009) 3(Suppl 1) *Addiction* 3.

¹⁸ L Hill, 'The Alcohol Industry' in Kris Heggenhougen and Stella Quah (eds), *International Encyclopaedia of Public Health* (Academic Press, 2008) 124, cited in Thomas Barbor et al, *Alcohol: No Ordinary Commodity* (Oxford University Press, 2nd ed, 2010) 333.

¹⁹ Peter Jones David Hillier and Daphne Comfort, 'That's the Spirit: Exploring the Approach of the World's Leading Spirits' Producers to Corporate Social Responsibility' (2013) 13 *Journal of Public Affairs* 3; Peter Jones, David Hillier and Daphne Comfort, 'The Leading Spirits and Beer Companies and Corporate Social Responsibility' (2013) 13(3) *Corporate Governance* 249.

²⁰ Jones, Hillier and Comfort, 'That's the Spirit: Exploring the Approach of the World's Leading Spirits' Producers to Corporate Social Responsibility', above n 19, 7; Jones, Hillier and Comfort, 'The Leading Spirits and Beer Companies and Corporate Social Responsibility', above n 19, 252-253. See also Barbor et al, above n 18, 233.

²¹ *Ibid.*

²² See Chapter 8, above.

²³ Lion, *Company* (2013) <<http://lionco.com/company/>>.

²⁴ Kirin Holdings, *Corporate Profile* (2013) <<http://www.kirinholdings.co.jp/english/company/index.html>>.

²⁵ Lion, *The Responsible Children's Marketing Initiative Company Action Plan* (18 June 2012) Australian Food and Grocery Council <<http://afgc.org.au/industry-codes/advertising-to-children/rcmi/company-action-plans.html>>; Lion, *Our History* (2013) <<http://lionco.com/company/our-history/>>.

²⁶ Lion, *2011 Sustainability Report* (2011) <<http://www.lionco.com/wp-content/uploads/2012/03/LionSR2011.pdf>>.

²⁷ *Ibid* 38-40.

²⁸ *Ibid* 40.

consumer education measures contribute to the company's attempt to 'help shape a country's eating and drinking culture'.²⁹

Industry-level initiatives complement individual alcohol companies' CSR strategies. For example, the global alcohol industry has established 'social aspects' organisations in Europe, the US and emerging markets in Asia and Africa.³⁰ The industry funds these organisations to promote responsible drinking messages and consumer education.³¹ The Australian equivalent is DrinkWise, described as an independent organisation 'focused on promoting... a healthier and safer drinking culture in Australia', but which has significant industry involvement in its funding and management.³² Public health researchers critique social aspects organisations for supporting policies that are ineffective in reducing underage drinking while hiding their real function, which is to influence political decision-making and public sentiment towards the industry.³³ Health advocates remain deeply sceptical about the value of food and alcohol companies' CSR strategies, as well as their role in chronic disease prevention more broadly.³⁴ Using advertising codes as an example, this chapter explores whether food and alcohol companies' CSR activities can make a meaningful contribution to protecting children from marketing for unhealthy products. As a first step, I consider the reasons that Australian food and alcohol companies give for joining the RCMI, QSRI or ABAC.

2. Food companies' rationale for joining the RCMI and QSRI

When explaining their reasons for adopting the Australian initiatives, interviewees made reference to their parent companies' participation in other national or international self-regulatory programs and private-public partnerships.³⁵ Thus, their commitment to responsible

²⁹ Ibid.

³⁰ Barbor et al, above n 18, 233; Peter Anderson, *The Beverage Alcohol Industry's Social Aspects Organisations: A Public Health Warning* (March 2003) Eurocare <http://eurocare.sydesy.com/resources/policy_issues/alcohol_beverage_industry/eurocare_papers>.

³¹ Ibid.

³² DrinkWise Australia, *About* (2012) <<http://www.drinkwise.org.au/about/about-drinkwise/>>.

³³ See, e.g., Hill, above n 18, 123; Wayne D Hall and Robin Room, 'Assessing the Wisdom of Funding DrinkWise' (2006) 185(11/12) *Medical Journal of Australia* 635; Peter G Miller et al, 'Health Experts Reject Industry-Backed Funding for Alcohol Research' (2009) 190(12) *Medical Journal of Australia* 713; Peter G Miller et al, 'Vested Interests in Addiction Research and Policy. Alcohol Industry Use of Social Aspect Public Relations Organisations Against Preventative Health Measures' (2011) 106(4) *Addiction* 1560.

³⁴ See, e.g., Kelly D Brownell and Kenneth E Warner, 'The Perils of Ignoring History: Big Tobacco Played Dirty and Millions Died. How Similar is Big Food?' (2009) 87(1) *The Milbank Quarterly* 259; Anna B Gilmore, Emily Savell and Jeff Collin, 'Public Health, Corporations and the New Responsibility Deal: Promoting Partnerships with Vectors of Disease?' (2011) 33(1) *Journal of Public Health* 2; David Stuckler and Marion Nestle, 'Big Food, Food Systems and Global Health' (2012) 9(6) *PLoS Medicine* 1 <<http://www.plosmedicine.org/article/info%3Adoi%2F10.1371%2Fjournal.pmed.1001242>>.

³⁵ See also Tymms, above n 3, 34.

marketing has its origins in the international environment in which food companies operate. The Corporate Communications Manager at Sugartec said that:

Sugartec... [has] major commitments... around the world in regards to our products. A part of that is [joining] self-regulatory pledges and working with advertising commitments.... Sugartec had already become a signatory of the EU Pledge and a participant to the Canadian pledge, so it was consistent with [Sugartec's] international position... to be a member of an Australian pledge...

Nine RCMI signatories are members of the IFBA. Ten RCMI/QSRI parent companies are signatories to the US *Children's Food and Beverage Initiative* (CFBAI), which is similar to the RCMI and QSRI.³⁶ Thus, for many companies, ratification of the Australian initiatives reflects the culture and policy position taken by the global parent company.³⁷ Participants in the independent review of the codes said that the passing of WHO's recommendations on food marketing to children also prompted them to develop new marketing policies and healthier products.³⁸

All participants said that their companies joined self-regulatory initiatives because of a genuine desire to 'do the right thing'. Four signatories told the independent reviewer that they were committed to improving the health and well-being of Australians.³⁹ Three other companies referred to the importance of restricting advertising to children in light of their vulnerability to advertising and their difficulty in understanding complex messages about health and diet.⁴⁰ Many of my interviewees said that their company prided itself on its good corporate citizenship and perceived itself as a leader in responsible marketing practices. Accordingly, adoption of the RCMI and QSRI aligned with the company's core values and overall business approach.⁴¹ For example, a nutritionist at FoodCorp said that adoption of the RCMI accorded with fundamental principles underpinning the firms' activities:

³⁶ See the description of this code in Table 1, Chapter 1. See also, Better Business Bureau, *Children's Food and Beverage Advertising Initiative Program and Core Principles Statement* (3rd ed, September 2010) Council of Better Business Bureaus <<http://www.bbg.org/us/childrens-food-and-beverage-advertising-initiative/info/#key%program>>. See also Better Business Bureau, *Company Pledges* (2013) Council of Better Business Bureaus <<http://www.bbb.org/us/children-food-beverage-advertising-initiative/2010-pledges/>>.

³⁷ Tymms, above n 3, 34.

³⁸ Ibid. See also Consumers International, above n 6, 8; World Health Organisations, 'Set of Recommendations on the Marketing of Foods and Non-Alcoholic Beverages to Children' (World Health Organisation, 2010) <<http://www.who.int/dietphysicalactivity/publications/recsmarketing/en/>>.

³⁹ Tymms, above n 3, 34.

⁴⁰ Ibid.

⁴¹ See Vogel, 'Private Global Business Regulation', above n 16, 268-269; David Vogel, *The Market for Virtue: The Potential and Limits of Corporate Social Responsibility* (Brookings Institution Press, 2006) ch 2; Simon Zadeck 'The Path to Corporate Responsibility' in Walther Ch Zimmerli, Claus Richter and Markus Holzinger (eds), *Corporate Ethics and Corporate Governance* (Springer, 2007) 159.

...FoodCorp has a set of values that we run our business by... Part of that value set is being open and honest and conducting business in an ethical way, so definitely [the RCMI] would be aligned to our business values.

Companies were also alert to community, public health and government concerns about food advertising and childhood obesity. Signatories were all large, high profile companies, with a significant investment in the reputation of their brands. Since these brands were highly visible to the public, public criticism carried the risk of harm to their reputation and revenues.⁴² The participant from Sugartec said that the company had a duty to market its products in accordance with community expectations about responsible marketing. Further, it made sense from a long-term economic perspective:

[I]f we're out of step with what [consumers] believe to be responsible, they'll tell us... they won't buy our products or they'll communicate back to us. And that should never be forgotten because fundamentally we exist to be in the business long-term. And if you're doing something slick in the short-term, you're certainly going to suffer in the long-term. So there's a fundamental business principle involved in getting this right.

For most participants, the codes served as a communications tool that helped them manage their relationship with consumers, public health actors and government, thereby improving company image and reputation.⁴³ Participants to the independent review said that industry self-regulation also helped to avoid government regulation that would inevitably restrict competition and innovation.⁴⁴ The Public Affairs Manager at Fast-Food Global said that '... the... industry knows that if we don't get involved and regulate ourselves we open ourselves up to being regulated by the government...' However, while participants referred to the idea of deflecting government regulation, consumer concerns seemed a much stronger motivator for companies' adoption of the codes.

It is easy to assume that food companies simply act as 'amoral calculators,' and adopt self-regulation purely for instrumental reasons, i.e. to increase their profitability or to forestall government regulation.⁴⁵ However, pressures from consumers, government and public health groups created an environment where companies came to view responsible marketing as a

⁴² See Lauren B Edelman, 'Legal Environments and Organisational Governance: The Expansion of Due Process in the American Workplace' (1990) 95(6) *The American Journal of Sociology* 1401.

⁴³ See also Organisation for Economic Co-Operation and Development, 'Corporate Responsibility: Private Initiatives and Public Goals' (OECD, 2001) 18 <<http://www.oecd.org/daf/inv/corporateresponsibility/>>.

⁴⁴ Tymms, above n 3, 35.

⁴⁵ See Robert A Kagan and John T Scholz, 'The "Criminology of the Corporation" and Regulatory Enforcement Strategies' in Keith Hawkins and John M Thomas (eds), *Enforcing Regulation* (Kluwer-Nijhoff, 1984) 67.

legitimate and appropriate part of good business practices. Accordingly, my interviewees discussed closely related ethical and economic reasons for adopting self-regulatory codes of conduct, suggesting a more nuanced basis for responsible marketing strategies.⁴⁶ Further, the adoption of the codes cannot be considered an entirely ‘voluntary’ measure, but resulted partly from external forces operating on the industry, including consumer demands, the threat of government regulation and the stance of global parent companies.⁴⁷

Interviewees stressed the importance of a collective response to external stakeholder concerns if the industry was to improve its public image and reputation. For example, legal counsel from Fast-Food Global said that:

It’s not going to make any difference to the way the industry’s run unless all of us agree that we’re all going to comply with the same standards...you’re not really responding to consumer sentiment if only one [company] of the entire industry is actually making an effort....

Respondents to the independent review said that the initiatives codified existing values and practices in the industry, but also added reporting requirements, external monitoring and penalties, making companies’ commitments more transparent and credible.⁴⁸ Additionally, self-regulation was a mechanism for rolling out ‘best practice’ standards across the industry and ensuring that all companies adhered to the same responsible marketing principles.

However, interviewees were concerned about whether other industry actors were joining and adhering to the codes. In the independent review, some companies said that other code signatories engaged in ‘creative compliance,’ i.e. exploiting loopholes in the scheme’s operation or doing just enough to implement a code.⁴⁹ They asked these signatories to comply with the ‘spirit and intent’ of the initiatives rather than seeking ways to advertise to children that could be perceived as circumventing their objectives while technically within the terms of the codes.⁵⁰ One company described a QSRI signatory using banner boards on the back of taxis and awnings covering large transport trucks to advertise in a way that appealed to children, despite the fact that the code covered outdoor billboards and posters.⁵¹ Signatories

⁴⁶ See also Neil Gunningham, Dorothy Thornton and Robert A Kagan, ‘Motivating Management: Corporate Compliance in Environmental Protection’ (2005) 27(2) *Law & Policy* 289, 312.

⁴⁷ Vogel, ‘Private Global Business Regulation’, above n 16, 265; Organisation for Economic Co-Operation and Development, above n 43, 17; Virginia Haufler, *A Public Role for the Private Sector: Industry Self-Regulation in a Global Economy* (Carnegie Endowment for International Peace, 2001).

⁴⁸ Tymms, above n 3, 34.

⁴⁹ Ibid 42.

⁵⁰ Ibid 34.

⁵¹ Ibid 42.

were concerned that these forms of advertising reduced the scheme's credibility. They were especially frustrating to those whose company action plans went beyond the minimum requirements of the codes.⁵²

Interviewees also felt that the industry's reputation was being challenged by the irresponsible behaviour of companies that were not signatories to the initiatives.⁵³ The Corporate Affairs Manager at Snack Co said that smaller companies had less economic incentive to regulate their advertising practices than large companies, or the expertise and resources to do so:

... it's like any kind of regulation with small business, they potentially don't have the resources that the larger companies have to bring across it... I think it creates a bit of an uneven playing field just because bigger companies tend to have the resources and the knowledge, whereas the smaller companies... a lot of them don't even know what the laws are sometimes.

Interviewees' concern with other companies' behaviour suggests that a 'community of shared fate' operated within the food industry, i.e., any high-profile incident of irresponsible marketing had the potential to affect the reputation of the entire industry.⁵⁴ Thus, self-regulation enabled companies to police each other's behaviour, ensuring that other actors did not undermine the industry's credibility in the eyes of consumers. However, Chapter 8 described how both codes have struggled to recruit new participants. This 'points to the challenge of imposing standardised and restrictive conditions on business activities that seek to limit competition in such a fiercely competitive space'.⁵⁵ Yet interviewees concerns suggest that the AFGC must broaden the scheme's membership if it is to be effective in uniformly improving industry standards of marketing.

3. Alcohol companies' rationale for joining the ABAC Scheme

As the ABAC Scheme commenced in 1997, it has been in operation much longer than the food industry codes.⁵⁶ Accordingly, alcohol industry interviewees said that compliance with the ABAC was a taken-for-granted part of good corporate practices, with one participant describing the code as 'a fundamental mechanic in the way we do business'. Alcohol

⁵² Ibid.

⁵³ Ibid.

⁵⁴ See Joseph Rees, *Hostages of Each Other: The Transformation of Nuclear Safety Since Three Mile Island* (1994); Neil Gunningham, 'Environment, Self-Regulation and the Chemical Industry: Assessing Responsible Care' (1995) 17(1) *Law & Policy* 57, 64.

⁵⁵ Tymms, above n 3, 42.

⁵⁶ The ABAC Scheme Limited, *The Development of Australia's Alcohol Beverages Advertising (and Packaging) Code* (undated) <http://www.dsica.com.au/content/detail/about_alcohol_alcohol_advertising_and_regulation>.

industry interviewees described a pre-existing commitment to responsible marketing practices that dictated their compliance with the ABAC, rather than vice versa. For example, the Corporate Affairs Manager at BevCo said that:

... one of the core values of the company is around responsible drinking... And so with that comes... an absolute respect for managing the social impact of alcohol and delivering it in a positive and responsible way. So BevCo is not directed by ABAC... we live up to it because of our guiding corporate philosophy.

Like food industry interviewees, alcohol industry interviewees said that their firms complied with the ABAC in response to government, public health and community scrutiny of industry practices. Interviewees said that because of the potential harms of alcohol misuse, the industry relied upon a social licence to operate. To retain the right to market its products to consumers, it had to meet community expectations about responsible marketing practices and avoid advertising that external stakeholders deemed unacceptable.⁵⁷ Accordingly, the Brand Communications Manager at Drink Inc said that:

... we as a business take our obligations very seriously regarding responsible conduct and... responsible marketing. We understand that we operate with a social licence and that how we communicate and how [we] market our products is very much with a certain expectation from the community.

Alcohol companies were responsive to consumer sentiment in the same manner as food companies, but the threat of government regulation seemed more salient in the alcohol industry. The interviewee from BevCo felt that irresponsible marketing could 'limit the potential of the industry to communicate about its brand', i.e. result in more stringent controls on alcohol marketing. One participant described the industry as operating in a 'politically hostile' environment, and another said that there was 'an air of inevitability' about government regulation of alcohol advertising.

Several alcohol company representatives also discussed the recent review of food labelling law and policy.⁵⁸ Following this review the Federal government expressed support for mandatory product labelling that warned about the risks of drinking alcohol while pregnant,

⁵⁷ See Neil Gunningham, Robert A Kagan and Dorothy Thornton, 'Social License and Environmental Protection: Why Businesses Go Beyond Compliance' (2004) 29(2) *Law & Social Inquiry* 307, 308.

⁵⁸ Neal Blewett et al, 'Labelling Logic: Review of Food Labelling Law and Policy' (Commonwealth of Australia, 2011)
<<http://www.foodlabellingreview.gov.au/internet/foodlabelling/publishing.nsf/content/labelling-logic>>.

as well as displaying energy content on alcohol beverage labels.⁵⁹ For some participants, this implied that the regulation of alcohol advertising could be next on the government's agenda. However, the participant from Drink Inc suggested that government sentiment was often confused with that of the anti-alcohol lobby, when in fact the Federal government took a positive view of the ABAC. Two alcohol industry participants felt that anti-alcohol lobby group pressure had increased in recent years. Thus, companies risked criticism from vocal advocacy groups should they fail to maintain responsible marketing practices. The interviewee from BevCo drew a connection between the activities of anti-alcohol groups and government regulation:

I think if [we] go back in time... we can look at liquor marketing in the '60s and '70s. That type of behaviour wouldn't be considered today, and if somehow it found its way into the public space there would be a very noisy and active lobby group looking for further tightening of regulations on liquor.

Interviewees also pointed to the fact that governments and advocacy groups drew connections between the alcohol and tobacco industries and their products.⁶⁰ Interviewees distinguished alcohol from tobacco products on the basis that the harms caused by alcohol were different in nature (and significantly less) than those caused by smoking.⁶¹ However, some participants were concerned that the alcohol industry would be 'demonised' in the same manner as the tobacco industry. For example, a Marketing Manager at AlcoBrands said that:

... the industry compares itself to cigarettes and to tobacco, not because they want to, but because they see the trend... it's easy and perhaps politically expedient to create alcohol as another social ill, and that then does have very quick and regulatory outcomes as a result...

Despite the apparent value of a collective response to stakeholder concerns in the form of a self-regulatory code, interviewees felt that some sectors of the industry were less likely to comply with the ABAC than others. Several spokespeople from the wine and spirits sectors

⁵⁹ Legislative and Governance Forum on Food Regulation (convening as the Australia and New Zealand Food Regulation Ministerial Council), *Response to the Recommendations of Labelling Logic: Review of Food Labelling Law and Policy (2011)* (10 December 2011) 28-32 Review of Food Labelling Law and Policy <<http://www.foodlabellingreview.gov.au/internet/foodlabelling/publishing.nsf/content/home>>; Foundation for Alcohol Research and Education, *Alcohol Product Labelling (2011)* <<http://www.fare.org.au/2011/10/slider-feature-2/>>.

⁶⁰ See, e.g., Laura Bond, Mike Daube and Tanya Chikritzhs, 'Selling Addictions: Similarities in Approaches Between Big Tobacco and Big Booze' (2010) 3(6) *Australasian Medical Journal* 326; Mike Daube, 'Alcohol and Tobacco' (2012) 36(2) *Australia and New Zealand Journal of Public Health* 108.

⁶¹ While cigarette smoking is always harmful, alcohol can be consumed in small quantities with little risk to health. Moderate alcohol usage may also have cardiovascular benefits for middle-aged drinkers. See the discussion in Chapter 11. See, e.g., Arthur L Klatsy and Natalia Udaltsova, 'Alcohol Drinking and Total Mortality Risk' (2007) 17(5) *Annals of Epidemiology* S63; National Health and Medical Research Council, 'Australian Guidelines to Reduce Health Risks from Drinking Alcohol' (Commonwealth of Australia, 2009) 39 <<http://www.nhmrc.gov.au/guidelines/publications/ds10>> .

said that breweries were less likely to market responsibly than other alcohol manufacturers.⁶² Smaller companies were also less likely to self-regulate because they had a greater interest in short-term profits than larger companies. The interviewee from BevCo said that one of the benefits of self-regulation lay in ensuring that smaller companies matched the ethical advertising practices of larger companies:

... not everyone would have a standard like BevCo; that part of the company's absolute DNA is fostering social responsibility. There are a lot of smaller players out there that would be more focused on the short-term commercial gain and something like ABAC means that those guys have to play at least to a minimum standard.

The alcohol industry also faced the problem that new groups were undertaking alcohol advertising, namely large food and alcohol retailers.⁶³ Although signatories to the ABAC demonstrated high levels of compliance with its terms, the fact that these new advertisers were not signatories to the scheme potentially undermined its coverage. The participant from Drink Inc discussed both these points:

The other thing is that currently the major supermarket chains, they are increasingly producing their own alcohol brands... they're not signatories to the ABAC Scheme... [the scheme] represents the larger part of all producers and brands, but as smaller players in beer and wine...[enter] into the market, and also the chains start to release their own [alcohol beverage] brands, that might start to be diluted.

4. Corporate compliance practices in the food industry

If companies are to institutionalise responsible business practices, self-regulation must be integrated into firms' decision-making structures and systems, as well as their corporate culture and every-day practices.⁶⁴ This entails creating internal codes of conduct and specialist business units to manage self-regulation, educating and training staff in code requirements, monitoring and enforcing compliance and permitting external reviews of the

⁶² See also Simone Pettigrew et al, 'The Extent and Nature of Alcohol Advertising on Australian Television' (2012) 31(6) *Drug and Alcohol Review* 797.

⁶³ See Evan Jones, 'Liquor Retailing and the Woolworths/Coles Juggernaut' (2005) 55 *Journal of Australian Political Economy* 1; Geoffrey Munro, 'Advertising Alcohol: When the Best Isn't Good Enough' (2006) 4(2) *Of Substance* 12. Although note that Woolworths has recently joined the ABAC Scheme, as discussed in Chapter 8.

⁶⁴ See, e.g., Parker, *The Open Corporation*, above n 1; Parker and Gilad, above n 1; Neil Gunningham and Darren Sinclair, *Leaders and Laggards: Next-Generation Environmental Regulation* (GreenLeaf Publishing, 2002) ch 7; Patrick E Murphy et al, *Ethical Marketing* (Pearson Prentice Hall, 2005) ch 7; S Prakash Sethi and Olga Emelianova, 'A Failed Strategy of Using Voluntary Codes of Conduct by the Global Mining Industry' (2006) 6(3) *Corporate Governance* 226, 234; Christine Parker and Vibeke Lehmann Nielsen, 'Corporate Compliance Systems: Could They Make Any Difference?' (2009) 41(3) *Administration and Society* 3.

system.⁶⁵ The RCMI and QSRI do not explicitly require that companies implement internal compliance systems,⁶⁶ but all participants had created internal controls on their marketing practices as one component of their CSR strategies.⁶⁷ Interviewees said that because food marketing is highly regulated,⁶⁸ they had internal processes for regulating advertising prior to the adoption of the RCMI or QSRI. Consequently, joining the codes did not mean that companies had to create fundamentally new compliance policies or practices. Many participants said that they simply applied existing processes to a new set of regulatory considerations. For example, the Sustainability Manager at Convenience Foods said that:

... because of the nature of the processes we already had built in the business, self-regulation...[has] just been another part of our already-built review process.

An additional consideration is that many signatory companies do not advertise to children, as defined by the terms of the two initiatives. For example, nine RCMI signatories reported that they did not advertise to children during 2009.⁶⁹ Thus, for many companies, adoption of the codes did not lead to significant changes in their marketing practices. However, some interviewees reported modifying or tightening internal systems to ensure on-going compliance with the initiatives. These measures included modifying internal advertising codes of conduct; training company employees and external marketing partners; changes to screening or review processes for marketing material; senior management involvement and/or oversight; and reporting on compliance.

The RCMI and QSRI require companies to create a company action plan, which operates as a publicly available document describing how participants will meet the codes' requirements.⁷⁰

⁶⁵ Ibid.

⁶⁶ See Australian Competition and Consumer Commission, 'Guidelines for Developing Effective Voluntary Industry Codes of Conduct' (Commonwealth of Australia, July 2011) 10 <<http://transition.accc.gov.au/content/index.phtml/itemId/658186>>.

⁶⁷ See also the measures described in companies' annual reports to the AFGC. Australian Food and Grocery Council, *Responsible Children's Marketing Initiative 2011 Compliance Report* (2011) <<http://www.afgc.org.au/industry-codes/advertising-to-children/rcmi/rcmi-reports-2009.html>>; Australian Food and Grocery Council, *Australian Quick Service Restaurant Industry Initiative for Responsible Advertising and Marketing to Children 2011 Compliance Report* (2011) <<http://www.afgc.org.au/component/content/article/15-industry-codes/1218-qsr-initiative-reports.html>>.

⁶⁸ See Chapter 2 for a description of the regulatory requirements that apply to food marketing and labelling. See, e.g., Food Standards Australia New Zealand, *Australia New Zealand Food Standards Code* (at 10 July 2013) std 1.2.7. (which sets out requirements for health and nutrition claims on food labelling).

⁶⁹ As compiled from signatory companies' 2009 company action plan reports, available from: Australian Food and Grocery Council, *RCMI Reports* (2010) <<http://www.afgc.org.au/industry-codes/advertising-to-children/rcmi/rcmi-reports-2009.html>>.

⁷⁰ Australian Food and Grocery Council, *The Responsible Children's Marketing Initiative of the Australian Food and Beverage Industry* (March 2011) 2 <<http://www.afgc.org.au/industry-codes/advertising-to-children/rcmi.html>>; Australian Quick Service Restaurant Industry, *Initiative for Responsible Advertising and*

Companies also undertook additional policy development processes upon joining the initiatives, including formalising pre-existing commitments on advertising to children and inserting self-regulatory requirements into internal codes of conduct. For Sugartec, the policy development process involved checking the alignment of the RCMI with the global parent company's marketing principles and other self-regulatory commitments. The company's representative described these steps as:

... the international senior management, working with our area management and our local managing director and myself to understand the alignment, [that is] the first stage. [Is the RCMI] consistent with the Sugartec principles... our guiding framework being the [IFBA], and also our company values... our first step is to ensure that the local pledge matches that.

All participants said that implementation of the initiatives involved training and educating internal business units, particularly marketing staff. For example, the lawyer from Fast-Food Global said that:

... the legal team... consistently educate [staff] about the marketing functions, so national marketing will have presentations done to them several times a year, when new people come on board they have to do online training modules... we're constantly updating [staff members], and when the [QSRI] came in we had a huge education program around that to... launch it...

Interviewees had comprehensive processes for screening marketing material to ensure regulatory compliance. Participants incorporated the codes into their quality management systems or internal auditing processes, or into comprehensive plans under which new products were developed and marketed.⁷¹ These processes typically involved members of corporate communications and/or the legal team reviewing marketing material against internal policies, relevant industry codes and legislative requirements. The interviewee from Food Corp described its screening procedures in some depth:

... any piece of communication... [has] to go through an approval process, so they have to be approved by brands governance... around food regulatory compliance, so we would be looking at how that complies with the *Food Standards Code*, but we would also be looking at how it complies with our...policies, so RCMI would be part of that... legal signs off... particularly in terms of trade practices, and any other legal issues... Marketing signs off on it... [and] the innovation person would have to sign off on it with new product development. If it was a sales piece, sales would have to sign

Marketing to Children (June 2009) para 5.1. Australian Association of National Advertisers <<http://www.aana.com.au/QuickServiceRestaurantInitiative.htm>>.

⁷¹ Tymms, above n 3, 35.

off on it, and so that then goes through a documented approval process and then all those comments get lodged and recorded for...corporate memory and due diligence.

Companies extended or modified their internal compliance systems in response to the initiatives. After adopting the RCMI, Sugartec tightened its screening processes by including checks on the placement of television advertisements prior to screening, followed by a post-analysis of the audience share of programs where its advertisements appeared. Similarly, Fast-Food Global created a new review process that involved analysis by the corporate communications team of all marketing directed to children, as well as screening by the legal team at a much earlier stage in the advertising development process. The lawyer I interviewed from the company said that:

... absolutely everything goes through legal regardless... [joining the QSRI] just meant that in our review of advertising we're... considering more factors than we would've had to consider and it's meant that we've had to get involved with the kids' advertising a lot earlier, so back in the day [the media agency] would just come with a finished commercial and go, can you just check that that's ok. Nowadays we want to get involved in the script and storyboard stage... we've just had the agency come to us with a rough concept...

Studies suggest that the success of compliance systems relies upon top management commitment and cultural supports for self-regulation.⁷² This could involve senior managers setting compliance goals and reviewing performance, as well as communicating the key message of industry codes to employees within the company.⁷³ Participants in this study said that senior managers played a critical role in ensuring compliance with voluntary codes and demonstrating support for self-regulation in various ways. Senior staff members from a number of companies participated in the working groups that developed the codes' terms and principles. Senior managers also oversaw implementation of the RCMI/QSRI at a company level; for example, by giving final approval on advertising material directed to children. Other interviewees mentioned that senior managers would approve the company's annual compliance report prior to its submission to the AFGC. Several participants stressed the importance of companies' commitment to the RCMI flowing from the top of the company down to the marketing and category teams and media partners.⁷⁴ The Corporate Affairs Manager at NutriCorp described the role of senior management in developing a culture of compliance within the organisation:

⁷² See, e.g., Parker, *The Open Corporation*, above n 1; Parker and Gilad, above n 1; Parker and Nielsen, above n 64.

⁷³ Parker, *The Open Corporation*, above n 1, 52, ch 3.

⁷⁴ See also Parker, *The Open Corporation*, above n 1, 203-205; Parker and Gilad, above n 1, 183-184.

...if your senior leaders aren't engaged behind these processes, or just see them as...tick boxes then that will filter down into your people, but if your company really does have at the core of it that it wants to do the right thing, has a culture that encourages that, then generally you're going to have that filter down from your leaders as well.

RCMI and QSRI companies report on compliance with their company action plan on a yearly basis, with the AFGC summarising these reports in its own annual compliance reports.⁷⁵ Accordingly, companies produce a public account of their advertising practices and the steps taken to comply with the code, which renders them accountable to outside assessment.⁷⁶ Several participants said that annual reporting to the AFGC comprised a key change under the self-regulatory system, particularly given that none of the advertising industry's voluntary codes required company reporting. According to the representative from Snack Co, annual reporting also allowed the company to compare its performance from one year to the next:

... [the annual compliance report] makes us reflect on what we did the year before and it's that reminder to senior management that this is another piece of brands governance that we need to keep in mind in the year forward. So if someone in senior management had just seen the RCMI report and they saw a piece of kid's advertising a week or a month later, they're probably likely to connect the two... a bit of a reminder of 'oh yeah, did we check this'.

The interviewee from Sugartec said that the importance of the reporting process lay in the fact that it enabled external scrutiny of company activities:

... we could rely on our internal processes and our corporate social responsibility manual, and say look how well we've been behaving, this is what we do. But being forced to go through that, not only internal checking, but then to report on that, to show that is certainly a step forward... it opens us [up] for people to look at what we do. And that's a check and we welcome that.

For these companies, adoption of the initiatives served as a 'reminder' about the importance of responsible marketing to children, as well as providing an opportunity to revise components of their marketing strategies.⁷⁷ However, while the initiatives require companies to report publicly on compliance, Chapter 7 described how the lack of a mandatory reporting framework makes it difficult to compare companies' commitments. Also, while some

⁷⁵ See Australian Food and Grocery Council, *Responsible Children's Marketing Initiative 2011 Compliance Report*, above n 67; Australian Food and Grocery Council, *Australian Quick Service Restaurant Industry Initiative for Responsible Advertising and Marketing to Children 2011 Compliance Report*, above n 67; Australian Food and Grocery Council, *Responsible Children's Marketing Initiative 2010 Compliance Report* (2010) <<http://www.afgc.org.au/industry-codes/advertising-kids.html>>.

⁷⁶ Organisation for Economic Co-operation and Development, above n 43, 54.

⁷⁷ Gunningham and colleagues similarly found that regulations and inspection together reminded electroplaters and chemical companies of their regulatory obligations and prompted them to review their compliance activities. See Gunningham, Thornton and Kagan, above n 46, 312.

participants commissioned external audits of their corporate social responsibility strategies, none sought independent assessment of their reporting under the RCMI and QSRI specifically.⁷⁸ Some CSR scholars criticise measures such as external assurance statements, but they are thought to be important in enhancing the transparency and credibility of companies' commitments and in giving them 'teeth'.⁷⁹

While some companies simply codified existing good practice, others made significant changes to their marketing strategies upon joining the codes. According to the independent review, 74 per cent of signatories applied restrictions to advertising that were technically outside the terms of the initiatives, but which gave effect to their spirit and intent.⁸⁰ Table 21 summarises the 'beyond compliance' measures that QSRI and RCMI participants reported in 2011. These included eliminating marketing directed to children for all brands and across all media, restricting advertising in media with an audience share of 30 or 35 per cent children rather than 50 per cent (which is the audience share requirement set by the RCMI's core document)⁸¹ and developing new products to meet the codes' nutritional criteria.⁸² These findings suggest that in some cases the codes resulted in an actual shift in marketing practices, as well as modifications to systems for managing and reviewing marketing material. Given that these measures are not directly related to the terms of the initiatives, an alternative explanation is that companies' responses to external pressures generated both changes in food marketing *and* self-regulatory commitments.⁸³ In other words, the codes themselves did not prompt these marketing changes, or reductions in advertising directed to children. This conclusion is supported by research showing that reductions in unhealthy food advertising to children pre-dated the introduction of the RCMI (as discussed in Chapter 4).⁸⁴

⁷⁸ See also Simon, above n 7, 103, where the author critiques the lack of transparency in PepsiCo's CSR initiatives, including the fact that they are not subject to external monitoring and evaluation.

⁷⁹ See Gunningham above n 54, 71-74; Gunningham and Sinclair, above n 64, 148; Matthew Potoski and Aseem Prakash, 'Green Clubs and Voluntary Compliance: ISO 14001 and Firms' Regulatory Compliance' (2005) 49(2) *American Journal of Political Science* 235; Carol A Adams and Ambika Zutshi, 'Corporate Disclosure and Auditing' in Rob Harrison, Terry Newholm and Deidre Shaw (eds), *The Ethical Consumer* (Sage, 2nd ed, 2006) 207; Michael John Jones and Jill Frances Solomon, 'Social and Environmental Report Assurance: Some Interview Evidence' (2010) 34(1) *Accounting Forum* 20.

⁸⁰ Tymms, above n 3, 35-36.

⁸¹ Australian Food and Grocery Council, *Responsible Children's Marketing Initiative*, above n 70, 1.

⁸² Tymms, above n 3, 35. See also Lesley King et al, 'Industry Self-Regulation of Television Food Advertising: Responsible or Responsive?' (2010) 6(2 Part 2) *International Journal of Paediatric Obesity* e390, e396 <<http://onlinelibrary.wiley.com/doi/10.3109/17477166.2010.517313/full>>. The authors concluded that RCMI participants' reductions in unhealthy food marketing following the introduction of the initiative went beyond what was required by its terms.

⁸³ King et al, 'Industry Self-Regulation of Television Food Advertising: Responsible or Responsive?' above n 82, e111.

⁸⁴ *Ibid.*

Table 21. RCMI and QSRI participants' activities to encourage healthy eating^{85*}

Company	Reported changes
RCMI participants	
Campbell Arnott's	Nutrition label warning that Tiny Teddy biscuits should only be eaten occasionally. Reformulation of the Tiny Teddy range with no artificial flavours, colours or preservatives.
Coca-Cola	Adopted an audience threshold of >35% children to determine whether media are directed to children.
Fonterra	A promotion encouraging parents' awareness of the nutritional value of eating dairy products, which included television advertisements, a magazine advertorial, point-of-sale material and a competition.
Fonterra	Free calendar promoting Calci-Yum yoghurt included in a national newspaper.
Ferrero	Adopted an audience threshold of >35% children to determine whether media are directed to children.
Kellogg's	Adopted an audience threshold of >35% children to determine whether media are directed to children.
Kraft Food	Participates in the 'Be Treatwise' voluntary nutrition labelling scheme for confectionery products.
Lion	Directs all marketing activity to adults, despite developing products to be eaten by children.
Mars	Participates in the Daily Intake Guide labelling scheme. Reduced portion sizes of its chocolate bars to 1,050kj or 420kj and reduced the saturated fat content of Mars Bars (by 22%) and Milky War Bars (19%).
Nestlé/Cereal Partners	Adopted an audience threshold of >25% children to determine whether media are directed to children, and defined children as individuals under the age of 14.
Patties	Developed a range of products lower in saturated fat and sodium for sales in schools.
QSRI participants	
Hungry Jack's	Redesigned its website to provide complete menu information, ingredient and allergen information, as well as providing in store-nutrition information. Reformulated products to reduce saturated fat, sugar and sodium, including in frying oil, buns, chicken nuggets, chicken, cheese and bacon.
McDonald's	Reductions in sugar and sodium across the menu, including a 30% reduction in sodium in Chicken Crispy Strips.
Oporto	Updated all packaging to include nutrition information.
Yum! Restaurants International (KFC and Pizza Hut)	No longer provides toys with any KFC meal. Introduction of a salad into the KFC product range and plans for a children's meal option. Reformulation of KFC and Pizza Hut products to reduce their sodium content.

* Note that not all participants reported on measures to improve the marketing environment in addition to those required by the RCMI and QSRI.

⁸⁵ See Australian Food and Grocery Council, *Responsible Children's Marketing Initiative 2011 Compliance Report*, above n 67.

Participants described some initial ‘teething problems’ in institutionalising code requirements.¹ In the independent review, four RCMI signatories reported some tension between corporate affairs and the business’s marketing team in relation to code implementation.² One interviewee said that there was an inherent conflict between regulatory compliance and marketers’ tendency to ‘push the envelope’ in an attempt to create new and innovative forms of promotion. This observation points to the fact that compliance can be undermined by the conflicting goals of different corporate units or by fragmented decision-making within organisational bureaucracies, despite the existence of corporate compliance processes.³

Another problem reported by the independent review and evident in my own research was the lack of clarity in relation to the meaning of key terms and definitions in the codes. Participants noted that the RCMI and QSRI were not prescriptive legislation, but a flexible, principles-based form of regulation with loosely defined terms. One of the benefits of the codes was that their meaning developed over time as the ASB changed its interpretation of particular terms, and as the AFGC amended the core code documents. However, this created difficulties for participants in determining whether advertising activity complied with the requirements of the initiatives. For example, two RCMI participants said that they had trouble deciding which nutrient criteria to use for identifying appropriate products that could be advertised to children. Other signatories had trouble determining whether a particular television program was ‘directed primarily to children’ for the purposes of the RCMI.⁴ Of particular concern were family movies that screened in the early evening and were watched by both parents and children. The participant from Sugartec described a complex procedure that the company used to determine whether it could advertise during these movies:

... we’ll consider firstly the rating of the movie if we can get it, if it’s been screened before we’ll check audience share... we’ll look at the time slot to make sure that it’s not say an earlier movie like 5.30 or 6.30... if it’s animated...

¹ Tymms, above n 3, 36.

² Ibid 37.

³ Parker, *The Open Corporation*, above n 1, 34. See also Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, 1992) 31-33.

⁴ Chapter 6 described how the RCMI determines the meaning of media ‘directed primarily to children’ according to different criteria (i.e. audience share, program classification and the creative content of the medium), so that the meaning of this term may not be immediately apparent.

The independent reviewer reported that signatories called for clearer definition of other code terms, for example ‘physical activity’, ‘healthy lifestyles’ and ‘good dietary habits’.⁵ Twelve signatories suggested that the AFGC or the Advertising Standards Bureau produce guidelines on the interpretation of the codes, similar to the practice note that the Australian Association of National Advertisers provides for the *Food and Beverages Advertising and Marketing Communications Code*.⁶ Signatories sought explanatory notes in order to refine their own marketing behaviour, but also to modify the behaviour of other companies in order to achieve a consistent industry-wide approach.⁷

Participants also had to manage the actions of external partners in the marketing process. Television networks awarded companies ‘bonus’ advertising spots that were not accounted for in signatories’ advertising schedules. Accordingly, there were several examples of advertisements airing in time slots that breached the codes.⁸ For this reason, many participants stressed the importance of briefing marketing and media buying agencies in the initiatives’ requirements.⁹ Signatories also devoted significant effort towards explaining to television networks the problems associated with granting bonus airtime for advertisements.¹⁰ Several signatories requested that the Free TV Commercial Advice Division classify their advertisements with a ‘W’ rating (G rated but place with care). This rating warns television stations to adhere to detailed information about placement restrictions when airing an advertisement in programs that are likely to attract a large child audience.¹¹ Sugartec’s representative described how he had taken steps to prevent accidental non-compliance during bonus air time slots:

... we... prepared a letter... which was sent to all of the traffic managers on all of the networks... outlining the importance of what we’re doing with the pledge, and highlighting the issues that we have with the bonus spots and asking for their assistance in not doing this, and to acknowledge our letter in

⁵ Tymms, above n 3, 41.

⁶ Ibid. See Australian Association of National Advertisers, *Food and Beverages Advertising and Marketing Communications Code Practice Note* (2013) <<http://www.aana.com.au/pages/codes.html>>.

⁷ Ibid 41-42.

⁸ See also Tymms, above n 3, 37; Australian Food and Grocery Council, *Responsible Children's Marketing Initiative 2011 Compliance Report*, above n 67, 16-22; Australian Food and Grocery Council, *Australian Quick Service Restaurant Industry Initiative for Responsible Advertising and Marketing to Children 2011 Compliance Report*, above n 67, 7; Australian Food and Grocery Council, *Responsible Children's Marketing Initiative 2010 Compliance Report* (2010), above n 75, 15, 17-18.

⁹ Tymms, above n 3, 37.

¹⁰ Ibid.

¹¹ Ibid. See Free TV Commercials Advice, *Classification Handbook: An Overview of Classification Procedures Incorporating the A-Z Television Production Checklist* (January 2010) 67 Commercials Advice Division <http://www.freetv.com.au/content_common/pg-cad-procedures-guide.seo>.

writing... So we've exerted as much influence as we can. We've changed the rating of the television commercials, we've explained in writing to these organisations please do not do this.

Other participants relinquished their rights to bonus airtime, one across all television stations at all times, another on digital stations only, and a third during Friday and Saturday night times slots (i.e. family movie times).¹² This step had significant financial implications for these companies, given that it is expensive to produce television commercials and airing them in bonus airtime slots is valuable to food companies.¹³

5. Alcohol companies' implementation of the ABAC

Participants from the alcohol industry took similar steps to ensure compliance with advertising self-regulation, namely drafting corporate policies in accordance with the codes' principles; training and educating employees and media agency staff; screening advertising material for compliance; and engaging senior management in compliance processes. All participants said that their company integrated the ABAC standards into their marketing policies. For example, the representative from Drink Inc said that:

...we have... internal policies and processes that cover our marketing activity and the ABAC code wording is embedded into those policies... the spirit and intent of the ABAC is very much central to all of our marketing and communication work that we do.

Alcohol companies described how they educated team members in compliance with the ABAC. For example, AlcoBrands included a 'responsibility module' as part of its internal marketing training course that all employees were required to take. A representative from Liquor International said that the company trained its external media agency in the ABAC in some detail. One interviewee discussed how her company used ABAC Adjudication Panel decisions to educate its internal marketing team:

We... educate our marketers on an on-going basis when new adjudications come out, so there was a recent one against Diageo's latest ad... that was upheld and... given that was such a high-profile advertisement we chose to send that to the marketers so they could understand... the Panel's opinion and... the outcome... So that kind of continual education... is pretty important.

Like the food industry, alcohol industry companies had internal review processes to ensure compliance with the ABAC Scheme, typically involving staff from corporate relations and/or

¹² Tymms, above n 3, 37.

¹³ Ibid.

the legal team. The Marketing Manager from AlcoBrands described a ‘multi-layered approval process’ that potentially involved sign-off from the global parent company in America:

... an assistant brand manager might develop something with an agency which is then approved by a brand manager, which then might go to a marketing director... it’ll go to country managers, and someone like myself that looks across the region. If we’re talking about very significant campaigns they’ll go to legal approval in America as well.

Alcohol industry participants described senior managers as being involved in compliance practices in various ways. For example, the Managing Director of one company was Chair of an alcohol industry body, meaning that he was a member of the ABAC Management Committee. A representative of this company said that:

... even our most senior members of the business are incredibly aware of our obligations...in our marketing team... building a positive drinking culture is... part of the marketing strategy which has sign-off from our executive team and so they’re all fundamentally engaged behind that... I certainly know from my experience that I’ll have sales director come up to me and say, ‘oh I saw this in market, I don’t think that’s compliant...’

Alcohol companies are not required to report on compliance with the ABAC in the same way as food companies are in relation to the RCMI and QSRI, but the ABAC Scheme requires participants to submit their advertising to the Alcohol Advertising Pre-Vetting Service.¹⁴ A pre-vetter determines whether advertising complies with the Australian Association of National Advertiser’s *Code of Ethics* and the ABAC prior to the advertisement’s publication or screening. As with the AFGC’s monitoring of the RCMI, the pre-vetting service forms an external check on companies’ compliance with advertising self-regulatory instruments. However, interviewees varied in their opinions of the usefulness of this service. One said that his company had been in business for a long time, and had well-developed internal compliance processes that made external screening redundant. However, he also thought that pre-vetting could be useful for smaller companies or new entrants to the market. In discussing problems with implementing the ABAC, some participants said that the pre-vetters often differed in their interpretation of the code, creating a degree of inconsistency in the screening process. The representative from AlcoBrands described his frustration when one of the pre-vetters rejected a large advertising campaign:

¹⁴ The ABAC Scheme Limited, *The ABAC Scheme: Rules and Procedures* (5 December 2012) cl 5.1 <<http://www.abac.org.au/publications/rules-procedures/>>. See Chapter 2 for further description of the AAPS.

...[t]he ad was rejected because one of the actors... was wearing a pair of sneakers. And the sneakers apparently meant that he was too young and it was going to appeal to children. So a global ad that was produced got rejected on the basis of someone wearing sneakers... it can be very subjective... That created a huge problem for us because suddenly we had no advertising campaign to go into Christmas with and we thought we had a very well-followed process....

Not all participants found pre-vetting to be useful in ensuring compliance. However, most interviewees saw it as a fundamental component of the ABAC Scheme and one that contributed to the scheme's success in promoting responsible alcohol advertising. However, alcohol companies are not obliged to report publicly on their compliance with the ABAC Scheme,¹⁵ and in this respect it is less transparent than food industry self-regulation, particularly as the results of pre-vetting are not made public.

6. Is industry self-regulation successful in changing the marketing environment?

To summarise so far, representatives of food and alcohol companies said that adherence to self-regulation formed an integral part of their business model, and described internal processes and policies that reflected their companies' commitment to compliance. Some food companies made significant changes to their marketing practices upon joining the RCMI and QSRI, going 'beyond compliance' with the codes in several cases. Food companies' descriptions of compliance are supported by monitoring and review of the RCMI and QSRI, which also show high levels of adherence to the codes.¹⁶ Audits of other national and international pledges produce similar findings, including both 'in-house' analyses performed by industry-based administrative bodies and external assessments by professional auditing firms.¹⁷ For example, the Council of Better Business Bureaus annually assesses participants'

¹⁵ See also Jones, Hillier and Comfort, 'Exploring the Approach of the World's Leading Spirits' Producers to Corporate Social Responsibility', above n 19, 7; Jones, Hiller and Comfort, 'The Leading Spirits and Beer Companies and Corporate Social Responsibility', above n 19, 254-255.

¹⁶ See Tymms, above n 3; Australian Food and Grocery Council, *Responsible Children's Marketing Initiative 2011 Compliance Report*, above n 67; Australian Food and Grocery Council, *Australian Quick Service Restaurant Industry Initiative for Responsible Advertising and Marketing to Children 2011 Compliance Report*, above n 67; Australian Food and Grocery Council, *Responsible Children's Marketing Initiative 2010 Compliance Report* (2010), above n 75; Healthy Kids Association, *Final Report on the Compliance of Signatories to the Australian Quick Service Restaurant Industry Initiative for Responsible Advertising to Children* (October 2011) Australian Food and Grocery Council <<http://www.afgc.org.au/tools-guides-.html>>; Australian Food and Grocery Council, *Food and Beverage Advertising to Children: Activity Report* (May 2012) <<http://www.afgc.org.au/industry-codes/advertising-to-children/rcmi/rcmi-reports-2009.html>>.

¹⁷ See, e.g., Christina Vladu, Rene Christensen and Adrian Pana, *Monitoring the European Platform for Action on Diet, Physical Activity and Health Activities: Annual Report 2012* (2012) IBF International Consulting <http://ec.europa.eu/health/nutrition_physical_activity/key_documents/index_en.htm#anchor1_more>; Accenture, *2012 Compliance Monitoring Report for the International Food and Beverage Alliance on Global Advertising on Television, Print and Internet* (December 2012) International Food and Beverage Alliance <<https://www.ifballiance.org/Resources/Resources-2-continued.html>>.

compliance with the US CFBAI, by monitoring media, reviewing participants' compliance reports and investigating reported breaches.¹⁸ The 2011 report found 'substantial' levels of compliance, with a small number of breaches due to technical problems or third-party errors.¹⁹ Taken together, these reports suggest that the food industry is routinely meeting the requirements of its voluntary programs in a number of jurisdictions.

In light of such findings, this thesis must reconcile two contradictory facts. On the one hand, the food companies I interviewed seemed genuine in wanting to improve their marketing practices, and took steps to do so. On the other, public health research finds that self-regulation has not significantly reduced children's exposure to unhealthy food advertising.²⁰ If companies are ethically committed to responsible marketing – and are following this through in their regulatory compliance and marketing practices – then why are advertising codes having little such effect on the marketing environment?

One possible answer is that interviewees' compliance practices are not representative of the food industry as a whole. I interviewed only a small number of code participants, representing a fraction of the food and alcohol companies in Australia. Further, it is likely that interviewees were companies with better advertising practices, as participants who viewed their organisation as a good corporate citizen were probably more willing to participate in the study. Participants were also very large companies with sufficient resources to secure compliance.²¹ Although many interviewees represent 'best practice' in the

¹⁸ See Elaine D Kolish and Magdalena Hernandez, 'The Children's Food and Beverage Advertising Initiative: A Report on Compliance and Progress During 2011' (Council of Better Business Bureaus, 2012) 13 <<http://www.bbb.org/us/childrens-food-and-beverage-advertising-initiative/>>.

¹⁹ Ibid 14.

²⁰ See, e.g., King et al, 'Industry Self-Regulation of Television Food Advertising: Responsible or Responsive?' above n 82; Lana Hebden A et al, 'Advertising of Fast-Food to Children on Australian Television: The Impact of Industry Self-Regulation' (2011) 195(1) *Medical Journal of Australia* 20; Lesley King et al, 'Building the Case for Independent Monitoring of Food Advertising on Australian Television' (2012) (*FirstView Article*) *Public Health Nutrition* <<http://journals.cambridge.org/action/displayAbstract?fromPage=online&aid=8706977>>. See also Monique Potvin Kent, Lise Dubois and Alissa Wanless, 'Self-Regulation by Industry of Food Marketing is Having Little Impact During Children's Preferred Television' (2011) 6(5-6) *International Journal of Paediatric Obesity* 401; Jennifer L Harris et al, 'Redefining "Child-Directed Advertising" to Reduce Unhealthy Television Food Advertising' (2013) 44(4) *American Journal of Preventive Medicine* 358. On young people's exposure to alcohol advertising, see Matthew V Winter, Robert J Donovan and Lynda J Fielder, 'Exposure of Children and Adolescents to Alcohol Advertising on Television in Australia' (2008) 69(5) *Journal of Studies on Alcohol and Drugs* 676; Lynda Fielder, Robert J Donovan and Robyn Ouschan, 'Exposure of Children and Adolescents to Alcohol Advertising on Australian Metropolitan Free-to-Air Television' (2009) 104(7) *Addiction* 1157.

²¹ See Parker and Gilad, above n 1, 188.

implementation of voluntary codes, my research does not demonstrate the extent to which other food and alcohol companies adhere to similar standards.²²

A second point is that independent research finds much higher levels of non-compliance with food industry advertising codes than studies conducted by industry bodies or external audits commissioned by the food industry.²³ One study of the Spanish code on food advertising to children found that almost half (49.3 per cent) of television advertisements from participating companies did not comply with the code.²⁴ These and other findings directly contradict the food industry's claims that companies are adhering closely to voluntary advertising codes. Research on compliance with the ABAC produces similar findings.²⁵ For example, one study analysed alcohol advertising in 93 magazines popular with young people.²⁶ It identified 142 unique advertisements, 52 per cent of which breached the ABAC, including one-fifth (22 per cent) that had strong appeal to children (as assessed by the researchers).²⁷

A more fundamental explanation is that voluntary advertising codes contain very weak standards that place few demands on participants and can be easily circumvented.²⁸ While some companies reported taking specific measures to improve their marketing practices in response to the RCMI and QSRI, it appears that overall the codes set a relatively low bar for compliance and did not require members to alter their marketing practices significantly. The codes simply formalised advertising practices that already existed among the most prominent companies, rather than creating new, more demanding standards. This is likely due to extensive consultation with the large industry players during the development of the codes.

Independent research on other food industry initiatives reaches much the same conclusion: companies have made some modest, incremental progress in reducing advertising unhealthy food to children, but are falling far short of standards that would significantly reduce

²² For a similar criticism, see Kathy Chapman, Penny Nicholas and Rajah Supramaniam, 'How Much Food Advertising is There on Australian Television?' (2006) 21(3) *Health Promotion International* 172, 176.

²³ See, e.g., Michele Roberts et al, 'Compliance with Children's Television Food Advertising Regulations in Australia' (2012) 12(1) *BMC Public Health* 846.

²⁴ M Mar Romero-Fernández, Migeul Ángel Royo-Bordonada and Fernando Rodríguez-Aralejo, 'Compliance with Self-Regulation of Television Food and Beverage Advertising Aimed at Children in Spain' (2009) 13(7) *Public Health Nutrition* 1013.

²⁵ See Fielder, Donovan and Ouschan, above n 105; Kati Donovan et al, 'Magazine Alcohol Advertising Compliance with the Australian Alcoholic Beverages Advertising Code' (2007) 26(1) *Drug and Alcohol Review* 73. See also Sandra Jones and Robert Donovan, 'Self-Regulation of Alcohol Advertising: Is it Working for Australia?' (2002) 2(3) *Journal of Public Affairs* 153; Simone Pettigrew, Rebecca Johnson and Mike Daube, 'Introducing and Applying a New Australian Alcohol Advertising Code' (2012) 13(1) *Journal of Public Affairs* 72.

²⁶ Kati Donovan et al, above n 110.

²⁷ *Ibid* 77.

²⁸ Chapter 6 describes the many 'escape clauses' contained in the RCMI and QSRI.

children's exposure to this form of promotion.²⁹ For example, one independent assessment of the US CFBAI found that food advertising during children's programming had declined from 10.9 advertisements per hour in 2005 to 7.6 in 2009.³⁰ However, foods and beverages were still some of the products most heavily advertised on television, meaning that children continued to see thousands of these advertisements each year.³¹ Further, the nutritional quality of products advertised remained heavily skewed towards foods high in calories and low in nutrients that children should eat only very occasionally.³²

My research presents a picture of companies carefully implementing voluntary codes that in practice do very little to improve the food marketing environment. This illustrates one of the fundamental problems with CSR – that companies may implement internal controls without achieving significant changes in corporate conduct.³³ This occurs where there is a lack of specificity in management systems, 'symbolic compliance' or poor implementation, but also where CSR measures are not aimed at meaningful objectives.³⁴ In these circumstances, companies are being held accountable for regulatory processes that do not achieve any substantive outcome.³⁵

Where industries create weak voluntary schemes they leave themselves open to the criticism that CSR is largely self-serving, i.e. it neutralises human rights, public health and environmental issues through the application of market-based techniques, while also blocking more effective and democratic forms of (government) regulation.³⁶ In these circumstances

²⁹ See, e.g., Consumers International, above n 6; Lang, Rayner and Kaelin, above n 6; Dale Kunkel, Christopher McKinley and Paul Wright, 'The Impact of Industry Self-Regulation on the Nutritional Quality of Foods Advertised on Television to Children' (Children Now, December 2009) <http://www.childrennow.org/index.php/learn/advertising_obesity>; Vivica I Kraak et al, 'Industry Progress to Market a Healthful Diet to American Children and Adolescents' (2011) 41(3) *American Journal of Preventive Medicine* 322.

³⁰ Kunkel, McKinley and Wright, above n 114, 15.

³¹ Ibid 21-22.

³² Ibid 22.

³³ Parker and Gilad, above n 1, 185; Lawrence A Cunningham 'The Appeal and Limits of Internal Controls to Fight Fraud, Terrorism, Other Ills' (2003-2004) *Journal of Corporate Law* 267, 270; Christine Parker, 'Meta-Regulation: Legal Accountability for Corporate Social Responsibility' in Doreen McBarnet, Aurora Voiculescu and Tom Campbell (eds), *The New Corporate Accountability: Corporate Social Responsibility and the Law* (Cambridge University Press, 2007) 207.

³⁴ Cunningham, above n 118; Parker, 'Meta-Regulation: Legal Accountability for Corporate Social Responsibility', above n 118, 244.

³⁵ Parker, 'Meta-Regulation: Legal Accountability for Corporate Social Responsibility', above n 118, 229-230.

³⁶ See the discussion in Chapter 3 about how regulatory studies 'depoliticises' public health, environmental and labour concerns. See Stepan Wood, 'Green Revolution or Greenwash? Voluntary Environmental Standards, Public Law and Private Authority in Canada' in Law Commission of Australia (ed), *New Perspectives on the Public-Private Divide* (UBC Press, 2003) 123; Ronen Shamir, 'Between Self-Regulation and the Alien Tort Claims Act: On the Contested Concept of Corporate Social Responsibility' (2004) 38(4) *Law and Society*

CSR may be damaging to public health. This is the case with tobacco industry strategies that aimed to improve companies' image by promoting their philanthropy and youth anti-smoking programs, while also maintaining the social acceptability of smoking, obscuring poor environmental and labour practices and undermining tobacco control efforts.³⁷ Thus, we need to be cautious about food and alcohol industry self-regulation that may do little more than protect the industry's reputation and enhance its credibility in the eyes of consumers, but may also deflect government interest in regulation.³⁸

Studies of other industries (including forestry, mining, apparel and nano-technology) find that it is not uncommon for voluntary codes to set weak standards.³⁹ In fact, codes may be easier to implement when they are largely 'aspirational' or require companies to do little more than comply with existing legal requirements.⁴⁰ This is because the costs of compliance will be relatively low, which makes it easier to attract participants to the scheme. However, codes can also be used to 'ratchet up' regulatory requirements once they are in place, for example by replacing broad principles with defined targets and enforceable standards.⁴¹ Food industry self-regulation could achieve public health benefits in the same manner, i.e. the AFGC could revise the terms of the initiatives to require companies to further improve their marketing practices, so that the codes would make a more significant contribution to obesity prevention. There is some evidence that the food industry is willing to strengthen its voluntary initiatives in this manner. Chapter 6 described how the AFGC has closed off some of the loopholes in the RCMI and QSRI. In the US, the Council of Better Business Bureaus recently made

Review 635; Ronen Shamir, 'Capitalism, Governance and Authority: The Case of Corporate Social Responsibility' (2010) 6 *Annual Review of Law of Social Science* 531.

³⁷ N Hirschhorn, 'Corporate Social Responsibility and the Tobacco Industry: Hope or Hype?' (2004) 13(4) *Tobacco Control* 447, 452. See also Dorfman et al, above n 4; Laura E Tesler and Ruth E Malone, 'Corporate Philanthropy, Lobbying and Public Health Policy' (2008) 98(12) *American Journal of Public Health* 2123; Sungkyu, Lee, Pamela M Ling and Stanton A Glantz, 'The Vector of the Tobacco Epidemic: Tobacco Industry Practices in Low and Middle-Income Countries' (2012) 23(1) *Cancer Causes Control* 117.

³⁸ See also Lisa L Sharma, Stephen P Teret and Kelly D Brownell, 'The Food Industry and Self-Regulation: Standards to Promote Success and to Avoid Public Health Failures' (2010) 100(2) *American Journal of Public Health* 240, 242.

³⁹ See, e.g., Sethi and Emelianova, above n 64; Margaret A Emmelhainz and Ronald J Adams, 'The Apparel Industry Response to "Sweatshop" Concerns: A Review and Analysis of Codes of Conduct' (1999) 35(3) *The Journal of Supply Chain Management* 51; Benjamin Cashore et al, 'Can Non-State Government 'Ratchet Up' Global Environmental Standards? Lessons from the Forest Sector' (2007) 16(2) *RECIEL* 158; Diana M Bowman and Graeme A Hodge, 'Counting on Codes: An Examination of Transnational Codes as a Regulatory Governance Mechanism for Nanotechnologies' (2009) 3(2) *Regulation and Governance* 145.

⁴⁰ Cashore et al, above n 124, 163.

⁴¹ *Ibid.* See also Gunningham and Sinclair, above n 64, 145-146; Sharma, Teret, and Brownell, above n 123, 243; Bowman and Hodge, above n 124, 159; John Moffet, Francois Bregha and Mary Jane Middelkoop, 'Responsible Care: A Case Study of a Voluntary Environmental Initiative' in Kernaghan Webb (ed), *Voluntary Codes: Private Governance, the Public Interest and Innovation* (Carleton Research Unit for Innovation, Science and Environment, Carleton University 2004) 177, 179-180.

similar improvements to the equivalent initiative, including a more inclusive definition of child-targeted media, extension of the initiative to alternative forms of promotion, and the adoption of uniform nutrition criteria.⁴²

However, several factors suggest that the food industry is unlikely to introduce a more demanding scheme that significantly reduces children's exposure to food advertising. First is the lack of consensus on the idea of responsible marketing to children. The industry maintains that the codes should apply to advertising that directly targets children.⁴³ Yet public health researchers argue that a more fundamental problem is children's exposure to large volumes of food advertising and a marketing environment that normalises routine consumption of unhealthy food.⁴⁴ Similarly, the alcohol industry conceptualises alcohol abuse as a minority problem associated mainly with underage drinking and drink-driving; hence restrictions on depicting children in alcohol advertising or associating alcohol consumption with the operation of motor vehicles.⁴⁵ However, this is a very narrow conception of irresponsible drinking, given evidence that alcohol misuse is a widespread problem that causes significant social and health harms.⁴⁶ Further, it will not lead to more comprehensive restrictions that substantially reduce the amount of alcohol advertising viewed by young people. Thus, a key challenge to producing credible standards on food and alcohol advertising lies in these industries' willingness to broaden their conception of responsible advertising in accordance with public health concerns.

⁴² See Kolish and Hernandez, above n 103.

⁴³ Ibid 3.

⁴⁴ See, e.g., Juliet B Schor and Margaret Ford, 'From Tastes Great to Cool: Children's Food Marketing and the Rise of the Symbolic' (2007) 35(1)*The Journal of Law, Medicine and Ethics* 10; Jennifer L Harris et al, 'A Crisis in the Marketplace: How Food Marketing Contributes to Childhood Obesity and What Can be Done' (2009) 30 *Annual Review of Public Health* 211; Lana Hebden, Lesley King and Bridget Kelly, 'Art of Persuasion: An Analysis of Techniques Used to Market Foods to Children' (2011) 47(11) *Journal of Paediatrics and Child Health* 776, 780.

⁴⁵ See Jones, Hillier and Comfort, 'That's the Spirit: Exploring the Approach of the World's Leading Spirits' Producers to Corporate Social Responsibility', above n 19, 8-9; The ABAC Scheme Limited, *Alcohol Beverages Advertising (and Packaging) Code* (March 2012) pt 1 s (a)(ii), (b), (d) <<http://www.abac.org.au/publications/thecode/>>.

⁴⁶ Jones, Hillier and Comfort, 'That's the Spirit: Exploring the Approach of the World's Leading Spirits' Producers to Corporate Social Responsibility', above n 19, 8-9. See, e.g., Ann M Roche and Kerriane Watt, 'Drinking and University Students: From Celebration to Inebriation' (1999) 18(4) *Drug and Alcohol Review* 389; Ministerial Council on Drug Strategy, 'Alcohol in Australia: Issues and Strategies' (Commonwealth Department of Health and Aged Care, 2001) ch 2 <[http://www.health.gov.au/internet/drugstrategy/publishing.nsf/Content/alc-strategy/\\$FILE/alcohol_strategy_back.pdf](http://www.health.gov.au/internet/drugstrategy/publishing.nsf/Content/alc-strategy/$FILE/alcohol_strategy_back.pdf)>.

One possibility is that self-regulation will provide a channel through which the various actors can reach consensus on the goals of the RCMI and QSRI.⁴⁷ However, a fundamental barrier to this occurring is the economic cost of meaningful advertising restrictions. While interviewees saw a ‘business case’ for self-regulation,⁴⁸ the independent review reported that code implementation created significant costs for signatories.⁴⁹ These stemmed from the creation of new marketing strategies; additional legal and corporate affairs resources for more elaborate advertising review and sign-off procedures; loss of revenue associated with withdrawal from advertising directed at children; additional staff training; and new product development and reformulation associated with meeting code requirements.⁵⁰ These costs could not be passed onto the consumer because of the highly competitive Australian grocery environment. While they remained committed to compliance, signatories received little direct commercial benefit from implementing the codes.⁵¹ Accordingly, companies that developed more ethical marketing practices risked putting themselves at a competitive disadvantage to their less responsible competitors. Companies may find it difficult to reconcile responsible marketing to children with their obligation to make a profit, particularly in an intensively competitive market.

A good example of the economic risks of CSR is PepsiCo, which has positioned itself as a leader of responsible conduct in the food industry. Its ‘Performance with Purpose’ program addresses health and nutrition issues, along with environmental sustainability, procurement practices, health and safety and human rights. The program includes setting and reporting on goals and standards; expansion of the company’s ‘Good-For-You’ portfolio; adopting internal codes on ethical marketing and advertising; supporting self-regulation and philanthropy; the creation of a ‘Global Nutrition Group’; and hiring public health experts to lead health and nutrition activities.⁵²

⁴⁷ Organisation for Economic Co-operation and Development, above n 43, 84. See also Kernaghan Webb, ‘Understanding the Voluntary Codes Phenomenon’ in Kernaghan Webb (ed), *Voluntary Codes: Private Governance, the Public Interest and Innovation* (Carleton Research Unit for Innovation, Science and Environment, Carleton University 2004) 2.

⁴⁸ See Vogel, *The Market for Virtue*, above n 41, ch 2.

⁴⁹ Tymms, above n 3, 38.

⁵⁰ Ibid.

⁵¹ Ibid.

⁵² See Acharya, et al, above n 7; Simon above n 7; Pepsio, *Purpose* (2012) <<http://www.Pepsico.com/Purpose.html>>.

PepsiCo's CEO Indra Nooyi was initially hailed as a 'strategic visionary' for her leadership of PepsiCo's CSR strategy.⁵³ However, investment critics now question the wisdom of the company's focus on healthier products, and the shift away from its core business of selling soft drink.⁵⁴ In 2011 PepsiCo lost ground to rival company Coca-Cola, with Pepsi slipping from number two in US soda sales to number three behind Coke and Diet Coke.⁵⁵ The company reports shrinking profits, with a five per cent decline in net income at the end of 2012.⁵⁶ In response to concerns about its profitability, PepsiCo returned to its traditional business model of advertising 'Fun-For-You' products like Pepsi-Cola, Lay's potato chips and Doritos corn chips (which make up 80 per cent of its sales),⁵⁷ as well as celebrity endorsement and elaborate Super Bowl promotions.⁵⁸

As the PepsiCo 'Good-for-You' and 'Fun-for-You' ranges illustrate, food companies develop healthier products while also selling their traditional unhealthy produce range. They continue to promote unhealthy foods and beverages to children, lobby against government intervention, and deny the connection between food advertising and dietary health. Further, there is evidence that Big Food acts responsibly in some markets but not others.⁵⁹ One study examined the product portfolios and sales data from The Coca-Cola Company and PepsiCo in the US, Brazil and China.⁶⁰ From 2000 to 2010, both companies increased their net revenue and net profit on a global scale. In the US, they experienced declining per capita sales in carbonated soft drink, but large increases in the sales of bottled water and sports and energy drinks. Meanwhile in Brazil and China daily per capita volume sales of soft drinks increased 269 and 147 per cent for Coca-Cola and PepsiCo respectively.⁶¹ In Brazil, soft drink sales more than doubled for Coca-Cola, reaching \$5,686 million in 2010, while those of PepsiCo

⁵³ Mike Esterl and Valerie Bauerlein, 'PepsiCo Wakes Up and Smells the Cola', *Wall Street Journal* (online) 28 June 2011 <<http://online.wsj.com/article/SB10001424052702304447804576412043487648846.html>>.

⁵⁴ Ibid.

⁵⁵ Ibid. See also Natalie Zmuda, 'How Pepsi Blinkered, Fell Behind Diet Coke', *AdvertisingAge* (online) 21 March 2011 <<http://adage.com/article/news/pepsi-blinkered-fell-diet-coke/149496/>>

⁵⁶ The Associated Press, '5% Decline in Profit at PepsiCo', *The New York Times* (online) 17 October 2012 <http://www.nytimes.com/2012/10/18/business/pepsicos-profit-declines-5.html?ref=pepsicoinc&_r=1&>.

⁵⁷ Esterl and Bauerlein, above n 138.

⁵⁸ See the debate concerning American singer Beyoncé's marketing deal with PepsiCo, which conflicts with her endorsement of US First Lady Michelle Obama's 'Let's Move' anti-obesity campaign: Mark Bittman, 'Why Do Stars Think It's OK To Sell Soda?' *The New York Times* (online) January 5 2013 <<http://opinionator.blogs.nytimes.com/2013/01/05/why-do-stars-think-its-o-k-to-sell-soda/?ref=pepsicoinc>>.

⁵⁹ See, e.g., Brownell and Warner, above n 34; David S Ludwig and Marion Nestle, 'Can the Food Industry Play a Constructive Role in the Obesity Epidemic?' (2008) 300(15) *Journal of the American Medical Association* 1808.

⁶⁰ S Kleiman, SW Ng and B Popkin, 'Drinking to Our Health: Can Beverage Companies Cut Calories While Still Maintaining Profits?' (2012) 13(3) *Obesity Reviews* 258.

⁶¹ Ibid 263.

grew from \$293 million in 2000 to \$675 million in 2010. The decline in sales of sweetened carbonated soft drink may have benefited the health of customers in the US. However, the authors raised the possibility that companies were offsetting declining growth in the US by turning to other markets, potentially with serious health impacts on these countries.⁶²

This is a reasonable hypothesis, given evidence that the alcohol and tobacco industries engaged in similar behaviour in response to declining sales, market saturation and increasing regulatory threats in developed countries.⁶³ Alcohol manufacturers enter new markets in Eastern Europe, Latin America and Asia by buying shares in existing companies or building new plants.⁶⁴ As a result, many of these countries have experienced a growth in alcohol-related social and health problems.⁶⁵ To create new markets in developing countries, tobacco manufacturers use aggressive marketing techniques that are heavily regulated elsewhere, block legislative restrictions on advertising, introduce weak voluntary codes and lobby countries to resist global tobacco control.⁶⁶

Like tobacco and alcohol, Big Food has rapidly penetrated low and middle income countries, accelerating the 'nutrition transition' and an associated growth in obesity and chronic diseases.⁶⁷ These examples demonstrate that companies will pursue CSR strategies only to the extent that there are economic incentives do to so, or in response to scrutiny from civil society, peer pressure from other companies, consumer demands or fear of regulation. Where these incentives and pressures do not exist, companies will continue with practices that

⁶² Ibid 266. See also Jeffrey P Koplan and Kelly D Brownell, 'Response of the Food and Beverage Industry to the Obesity Threat' (2010) 304(13) *Journal of the American Medical Association* 1487, 1488.

⁶³ Rob Moodie et al, 'Profits and Pandemics: Prevention of Harmful Effects of Tobacco, Alcohol and Ultra-Processed Food and Drink Industries' (2013) 381 *The Lancet* 670, 671.

⁶⁴ Barbor et al, above n 19, 78.

⁶⁵ Ibid; Robin Room and David Jernigan, 'The Ambiguous Role of Alcohol in Economic and Social Development' (2000) 95(12 s4) *Addiction* 523; Raekha Prasad, 'Alcohol Use on the Rise in India' (2009) 373(9657) *The Lancet* 17.

⁶⁶ See, e.g., Lee, Ling and Glantz, above n 122; Report of the Committee of Experts on Tobacco Industry Documents, *Tobacco Company Strategies to Undermine Tobacco Control Activities at the World Health Organisation* (July 2000) World Health Organisation <http://www.who.int/tobacco/en/who_inquiry.pdf>; Yussuf Saloojee and Elif Dagli, 'Tobacco Industry Tactics for Resisting Public Policy on Health' (2000) 78(7) *Bulletin of the World Health Organisation* 902; Ernesto Sebríe and Stanton Glantz, 'The Tobacco Industry In Developing Countries Has Forestalled Legislation on Tobacco Control' (2006) 332(7537) *British Medical Journal* 313; Richard D Hurt et al, 'Roadmap to a Tobacco Epidemic: Transnational Tobacco Companies Invade Indonesia' (2012) 21 *Tobacco Control* 306.

⁶⁷ Stuckler and Nestle, above n 34; Moodie et al, above n 148, 671. See also R Beaglehole and D Yach, 'Globalisation and the Prevention and Control of Non-Communicable Disease: The Neglected Chronic Diseases of Adults' (2003) 362(9387) *The Lancet* 903; David Stuckler et al, 'Manufacturing Epidemics: The Role of Global Producers in Increased Consumption of Unhealthy Commodities Including Processed Foods, Alcohol and Tobacco' (2012) 9(6) *PLoS Medicine* e1001235 <<http://www.plosmedicine.org/article/info%3Adoi%2F10.1371%2Fjournal.pmed.1001235>>; Sanjay Basu et al, 'Nutritional Determinants of Worldwide Diabetes: An Econometric Study of Food Markets and Diabetes Prevalence in 173 Countries' (2013) 16(1) *Public Health Nutrition* 179.

undermine public health, as illustrated by increasing soft drink sales in developing countries. Given that meaningful advertising restrictions pose significant economic costs for companies involved (and few tangible benefits), some form of external pressure is likely to be required to strengthen controls on advertising unhealthy food to Australian children.

7. Conclusion

Ethical and economic reasons prompted large food and alcohol companies to join advertising codes of conduct. Companies integrated the requirements of these codes into management controls, as well as making practical changes to their marketing campaigns. Complementing these findings are other studies that report high levels of compliance with voluntary industry initiatives. However, participants' practices make a limited contribution to improvements in the food marketing environment, because firms are complying with very weak regulatory standards. It is theoretically possible to strengthen the RCMI and QSRI so that they place more demanding requirements on signatories, yet the food industry is unlikely to take this step unilaterally. Some food companies appear to be genuinely committed to 'doing the right thing', and changing their advertising practices in line with public health concerns, at least in developing countries. However in a highly competitive market, those who voluntarily restrict their marketing practices risk losing sales to their less ethical competitors. Thus, companies' responsible practices are patchy at best, as it is not always in their economic interest to behave ethically. This suggests that the application of external pressure will be needed to produce uniform improvements in food companies' behaviour in a manner that significantly reduces children's exposure to unhealthy food marketing. Chapters 10 and 11 consider how public health and government intervention could be used to 'ratchet up' standards of food marketing to achieve this objective.

CHAPTER 10

The business of public health? Health sector participation in food industry self-regulation

In Chapters 6 to 9, I demonstrated how the self-regulatory scheme governing food advertising to children is failing. The next two chapters consider ways in which it could be improved. In Chapter 2, I drew on theories of regulation to describe how external stakeholder participation can improve the transparency and accountability of private regulation.¹ Further, theories of deliberative democracy require that all affected parties have an opportunity to contribute to decision-making on the form and content of regulation.² At the same time, the withdrawal of the state from regulatory space has created scope for new forms of private regulation, including those that adopt participatory governance procedures.³ Bearing these points in mind, this chapter explores the possibility of enhancing stakeholder participation in food industry self-regulation as a way of strengthening the public's interest in the program. I use the ABAC Scheme as an example of what a more collaborative approach might look like in practice, as it includes both public health and government representation in its governance processes. The chapter draws upon data from interviews with representatives of nine public health advocacy organisations and research institutes and two interviews with academic researchers. I also present findings from interviews with two representatives of alcohol trade associations, one member of the ABAC Management Committee, two members of the ABAC Adjudication Panel and a representative of the Advertising Standards Bureau.

The chapter begins by discussing the increasing use of collaborative initiatives in public health. Next I explore the extent to which public health advocates influence food and alcohol industry self-regulation, both indirectly and by participating in self-regulatory processes.

¹ See, e.g., Ortwin Renn, Thomas Webler and Peter Wiedemann (eds), *Fairness and Competence in Citizen Participation: Evaluating Models for Environmental Discourse* (Kluwer Academic, 1995); Magnus Bostrom, 'Regulatory Credibility and Authority Through Inclusiveness: Standardisation Organisations in Cases of Eco-Labeling' (2006) 13(3) *Organisation* 345; Nick J Fox and Katie J Ward, 'What Governs Governance, and How Does It Evolve? The Sociology of Governance-In-Action' (2008) 59(3) *The British Journal of Sociology* 519, 528.

² See, e.g., Julia Black, 'Proceduralising Regulation: Part 1' (2000) 20(4) *Oxford Journal of Legal Studies* 597; Christine Parker, *The Open Corporation: Effective Self-Regulation and Democracy* (Cambridge University Press, 2002) 37-43.

³ See, e.g., David Vogel, 'Private Global Business Regulation' (2008) 11 *Annual Review of Political Science* 261; Christine Overdevest, 'Comparing Forest Certification Schemes: The Case of Ratcheting Standards in the Forest Sector' (2010) 8(1) *Socio-Economic Review* 47, 53.

Then I report on whether public health interviewees thought it would be appropriate for public health stakeholders to join non-statutory, quasi-regulatory processes governing food advertising, similar to the ABAC Scheme. I conclude by arguing against external stakeholder participation in industry-based schemes, at least in the absence of government intervention and oversight, because of the significant risk that public health interests will be subverted by those of industry.

1. New forms of public health governance

As in other fields (such as the apparel industry, forestry and fisheries),⁴ collaborative public health initiatives are becoming increasingly common. Traditional public health advocacy was based on an adversarial relationship between activists and the private sector, with health actors calling for government regulation of industry, researching corporate practices, conducting media campaigns and instigating litigation against high profile companies.⁵ Tobacco control is held up as one of the great successes of this model of advocacy, both in Australia⁶ and internationally.⁷ Public health actors lobbied vigorously against the tobacco industry, drawing upon traditional methods of activism as well as more unconventional forms of social protest.⁸ Despite fierce industry resistance,⁹ public health advocacy cumulated in

⁴ See, e.g., Benjamin Cashore, Graeme Auld and Deanna Newsom, *Governing Through Markets: Forest Certification and the Emergence of Non-State Authority* (Yale University Press, 2004); Tim Bartley, 'Certifying Forests and Factories: States, Social Movements and the Rise of Private Regulation in the Apparel and Forest Products Fields' (2003) 31(3) *Politics and Society* 433; Michael J Kaiser and Gareth Edwards-Jones, 'The Role of Ecolabelling in Fisheries Management and Conservation' (2006) 20(2) *Conservation Biology* 392. See also Chapter 3, which describes new forms of public health governance in more depth.

⁵ Katherine Kaufer Christoffel, 'Public Health Advocacy: Process and Product' (2000) 90(5) *American Journal of Public Health* 722, 723; Nicholas Freudenberg, 'Public Health Advocacy to Change Corporate Practices: Implications for Health Education Practice and Research' (2005) 32(3) *Health, Education and Behaviour* 298; Nicholas Freudenberg, 'Campaigns to Change Health-Damaging Corporate Practices' in William H. Wiist (ed), *The Bottom Line or Public Health: Tactics Corporations Use to Influence Health and Health Policy, and What We Can Do to Counter Them* (Oxford University Press, 2010) 423.

⁶ Constance A Nathanson, 'Social Movements as Catalysts for Policy Change: The Case of Smoking and Guns' (1999) 24(3) *Journal of Health Politics, Policy and Law* 421.

⁷ Simon Chapman and Deborah Lupton, *The Fight For Public Health: Principles and Practice of Media Advocacy* (BMJ Publishing Group, 1994) 4; Simon F Chapman and Melanie Wakefield, 'Tobacco Control Advocacy in Australia: Reflections on 30 Years of Progress' (2001) 28(3) *Health Education & Behaviour* 274.

⁸ Ibid. See also Robin Walker, *Under Fire: A History of Tobacco Smoking in Australia* (Melbourne University Press, 1984) ch 8; Simon F Chapman, 'Civil Disobedience and Tobacco Control: The Case of BUGA UP' (1996) 5(3) *Tobacco Control* 179; Ian Tyrrell, *Deadly Enemies: Tobacco Control and Its Opponents in Australia* (UNSW Press, 1999) ch 13.

⁹ S M Carter and S Chapman, 'Smoking, Disease and Obdurate Denial: The Australian Tobacco Industry in the 1980s' (2003) 12(Suppl III) *Tobacco Control* iii23; Claire Hooker and Simon F Chapman, 'Structural Elements in Achieving Legislative Tobacco Control in NSW 1955-1995: Political Reflections and Implications' (2005) 30(1) *Australian and New Zealand Journal of Public Health* 10; Laura E Tesler and Ruth E Malone, 'Corporate Philanthropy, Lobbying and Public Health Policy' (2008) 98(12) *American Journal of Public Health* 2123, 2128.

legislative bans on almost all forms of tobacco marketing in Australia.¹⁰ At an international level, it led to the creation of WHO's *Framework Convention on Tobacco Control*.¹¹ This treaty requires that governments protect national tobacco control policies from the commercial and vested interests of the tobacco industry, blocking the industry from participating in public health decision-making.¹²

While Big Tobacco remains a 'pariah industry' (though still very powerful and diversified)¹³ international norms take a more favourable view of the food and alcohol industries. The 2011 United Nations political declaration on non-communicable diseases acknowledged the fundamental conflict of interest between the tobacco industry and public health.¹⁴ However, it called for collaborative partnerships that engaged civil society and industry to reduce non-communicable disease risk factors.¹⁵ WHO's *Global Strategy on Diet, Physical Activity and Health* and the *Global Strategy to Reduce the Harmful Use of Alcohol* also assume scope for partnership with the food and alcohol industries.¹⁶ For example, the former recommends that governments work with consumer groups and the private sector to develop 'appropriate multisectoral approaches to deal with the marketing of food to children'.¹⁷ The latter calls for alcohol harm reduction policies that engage a range of government sectors, civil society and 'economic operators'.¹⁸ It also encourages alcohol manufacturers and retailers to introduce measures to prevent and reduce the harmful use of alcohol, including self-regulation and

¹⁰ See, e.g., *Tobacco Advertising Prohibition Act 1992* (Cth); *Public Health (Tobacco) Act 2008* (NSW).

¹¹ Hadii M Mamudu, Maria Elena Gonzalez and Stanton Glantz, 'The Nature, Scope and Development of the Global Tobacco Control Epistemic Community' (2011) 101(11) *American Journal of Public Health* 2044; World Health Organisation, *Framework Convention on Tobacco Control*, adopted 21 May 2003 (entered into force 27 February 2005).

¹² World Health Organisation, *Framework Convention on Tobacco Control*, adopted 21 May 2003 (entered into force 27 February 2005) art 5(3).

¹³ Mike Daube, 'Alcohol and Tobacco' (2012) 36(2) *Australia and New Zealand Journal of Public Health* 108.

¹⁴ UN General Assembly, Political Declaration of the High-Level Meeting of the General Assembly on the Prevention and Control of Non-Communicable Diseases, 66th sess, Agenda Item 117, UN Doc A/66/L.1. (16 September 2011) 5.

¹⁵ *Ibid* 11.

¹⁶ Anna B Gilmore, Emily Savell and Jeff Collin, 'Public Health, Corporations and the New Responsibility Deal: Promoting Partnerships with Vectors of Disease?' (2011) 33(1) *Journal of Public Health* 2; World Health Organisation, 'Global Strategy on Diet, Physical Activity and Health' (World Health Organisation, 2004) 7 <<http://www.who.int/dietphysicalactivity/strategy/eb11344/en/index.html>>; World Health Organisation, 'Global Strategy to Reduce the Harmful Use of Alcohol'

(World Health Organisation, 2010) 19 <http://www.who.int/substance_abuse/activities/gsrhua/en/index.html>.

¹⁷ World Health Organisation, 'Global Strategy on Diet, Physical Activity and Health', above n 16. See also World Health Organisation, '2008-2013 Action Plan for the Global Strategy for the Prevention and Control of Noncommunicable Diseases' (World Health Organisation, 2009) 24 <<http://www.who.int/nmh/publications/9789241597418/en/>>.

¹⁸ World Health Organisation, 'Global Strategy to Reduce the Harmful Use of Alcohol', above n 16, 6.

voluntary initiatives.¹⁹ Thus, both documents envisage a role for collaborative or co-regulatory approaches to food and alcohol promotion.

International norms on cooperation with the private sector translate into national contexts, with governments and health actors engaging with the alcohol and food industries in various ways. Some public health actors use adversarial forms of advocacy against these industries, but others accept employment in food companies, engage in marketing partnerships (as where NGOs allow a logo to appear on companies' products for a fee) and participate in industry initiatives.²⁰ Public-private partnerships represent an increasingly common form of industry engagement, with private, public and/or NGO actors collaborating in pursuit of a shared objective.²¹ Partnerships encompass a diverse array of initiatives, from equally shared decision-making among partners to private sector engagement within a framework of government-set targets and monitoring.²² The UK Responsibility Deal aims to promote healthy behaviour and make healthy choices easier using voluntary agreements with industry.²³ Participating companies agree to abide by a set of core principles and collective 'pledges' that set out the actions they will take in the areas of alcohol, food, health, the workplace and physical activity.²⁴ Pledges are determined by 'networks' that include government, industry and civil society representatives. The food pledges include commitments on salt reduction, the provision of calorie information and the removal of artificial trans fats from food products.²⁵ Pledges on alcohol relate to alcohol content and

¹⁹ Ibid 20.

²⁰ See, e.g., The Food Commission, *Cause or Compromise? A Survey Into Marketing Partnerships Between Food Companies and Health Charities or Medical Associations* (April 2002) 19

<<http://www.foodcomm.org.uk/campaigns/reports/>>; Rogan Kersch and James Morone, 'The Politics of Obesity: Seven Steps to Government Action' (2002) 21(6) *Health Affairs* 142, 147-148; Michele Simon, 'PepsiCo and Public Health: Is the Nation's Largest Food Company a Model of Corporate Responsibility or Master of Public Relations?' (2012) 15 *CUNY Law Review* 10.

²¹ Michael R Reich, 'Introduction: Public-Private Partnerships for Public Health' in Michael R Reich (ed), *Public-Private Partnerships for Public Health* (Harvard University Press, 2002) 1, 3; World Health Organisation, *Public Private Partnerships for Health* (2012) <<http://www.who.int/trade/glossary/story077/en/>>.

²² Corinna Hawkes and Kent Buse, 'Public Health Sector and Food Industry Interaction: It's Time to Clarify the Term "Partnership" and Be Honest About Underlying Interests' (2011) 21(4) *European Journal of Public Health* 400.

²³ Department of Health, *Healthy Lives, Healthy People: Our Strategy for Public Health in England* (HM Government, 30 November 2010) 30 <http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_121941.

²⁴ Department of Health, *Pledges* (undated) <<http://responsibilitydeal.dh.gov.uk/pledges/>>.

²⁵ Public Health Responsibility Deal, *Public Health Responsibility Deal: Food Pledges* (20 December 2011) Department of Health <<https://responsibilitydeal.dh.gov.uk/food-pledges/>>.

warning labels, promoting information about responsible drinking and preventing sales to underage drinkers.²⁶

There is on-going debate in the public health community regarding the value of collaboration with commercial entities.²⁷ Many public health advocates take issue with WHO's approach to the food and alcohol industries and argue forcefully against public-private partnerships.²⁸ They point to parallels between the health harms of alcohol, tobacco and highly processed foods, as well as a corporate 'playbook' of tactics common to Big Food, Big Tobacco and Big Alcohol.²⁹ Further, there is evidence that voluntary or collaborative initiatives fail to achieve public health goals, generating only small and incremental improvements at best, and deflecting government attention from more effective interventions.³⁰ Typically, partnerships set weak targets, inadequately manage conflicts of interest and lack transparency and accountability.³¹ For these reasons, public health actors say that the tobacco control model should be applied to food and alcohol.³² Governments must exclude industry actors from processes of policy development and consult with them only as necessary to design effective

²⁶ Public Health Responsibility Deal, *Public Health Responsibility Deal: Alcohol Pledges* (20 December 2011) Department of Health <<https://responsibilitydeal.dh.gov.uk/alcohol-pledges/>>.

²⁷ See, e.g., David S Ludwig and Marion Nestle, 'Can the Food Industry Play a Constructive Role in the Obesity Epidemic?' (2008) 300(15) *Journal of the American Medical Association* 1808; Kelly D Brownell, 'Thinking Forward: The Quicksand of Appeasing the Food Industry' (2009) 9(7) *PLoS Medicine* 1 <<http://www.plosmedicine.org/article/info%3Adoi%2F10.1371%2Fjournal.pmed.1001254>>; Rob Moodie et al, 'Profits and Pandemics: Prevention of Harmful Effects of Tobacco, Alcohol and Ultra-Processed Food and Drink Industries' (2013) 381 *The Lancet* 670.

²⁸ See, e.g., Gilmore, Savell and Collin, above n 16; Yoni Freedhoff and Paul C Hébert, 'Partnerships Between Health Organisations and the Food Industry Risk Derailing Public Health Nutrition' (2011) 183(3) *Canadian Medical Association Journal* 291; Kawther Hashem, Christine Haigh and Charlie Powell, *The Irresponsibility Deal? Why the Government's Responsibility Deal is Better for the Food Industry Than Public Health* (September 2011) 8 Children's Food Campaign <http://www.sustainweb.org/news/sep11_2011_responsibility_deal/>.

²⁹ Moodie et al, above n 27; Kelly D Brownell and Kenneth E Warner, 'The Perils of Ignoring History: Big Tobacco Played Dirty and Millions Died. How Similar Is Big Food?' (2009) 87 *The Milbank Quarterly* 259; William H Wiist, 'The Corporate Playbook, Health and Democracy: The Snack Food and Beverage Industry's Tactics in Context' in David Stuckler and Karen Siegel (eds), *Sick Societies: Responding to the Global Challenges of Chronic Disease* (Oxford University Press, 2011) 204.

³⁰ Ludwig and Nestle, above n 27, 2-3; Moodie et al, above n 27, 670; Brownell, above n 27, 2.

³¹ Ludwig and Nestle, above n 27; Freedhoff and Hébert, above n 28; Kent Buse and Andrew M Harmer, 'Seven Habits of Highly Effective Global Public-Private Health Partnerships: Practice and Potential' (2007) 64(2) *Social Science and Medicine* 259, 262-263; Carlos Monteiro, Fabio S Gomes and Geoffrey Cannon, 'The Snack Attack' (2010) 100(6) *American Journal of Public Health* 975; Vivica I Kraak et al, 'Balancing the Benefits and Risks of Public-Private Partnerships to Address the Global Double Burden of Nutrition' (2012) 15(3) *Public Health Nutrition* 503, 504.

³² See Derek Yach et al, 'The World Health Organisation's Framework Convention on Tobacco Control: Implications for Global Epidemics of Food-Related Deaths and Disease' (2003) 24(3/4) *Journal of Public Health Policy* 274; Editorial, 'Urgently Needed: A Framework Convention for Obesity Control' (2011) 378(9793) *The Lancet* 741.

regulation.³³ According to these critics, public health organisations should disengage from private-public partnerships and refuse funding and other support from the food and alcohol industries.³⁴ Rather than aligning themselves with industry, public health groups must focus on supporting government action, primarily by advocating for prescriptive command-and-control legislation.³⁵

Other public health actors take a more conciliatory approach to industry engagement, particularly towards Big Food.³⁶ Their position is that the food industry cannot be 'denormalised' to the same extent as tobacco, given that people need to eat.³⁷ Partnerships also represent the best compromise solution in circumstances where the government is reluctant to regulate.³⁸ Further, the enormous reach of the transnational food industry gives it significant capacity to influence dietary patterns.³⁹ For example, the top ten multinational food companies collectively have revenues in excess of US\$350 billion annually and a presence in over 200 countries.⁴⁰ Through product reformulation these companies can remove vast quantities of salt, sugar and fat from the global food supply, to the benefit of population of health.⁴¹

³³ World Health Organisation, *Framework Convention on Tobacco Control*, adopted 21 May 2003 (entered into force 27 February 2005) art 5(3); Daube, above n 13; Gilmore, Savell and Collin, above n 16; Hawkes and Buse, 'Public Health Sector and Food Industry Interaction', above n 22, 410; Brownell, above n 27; Moodie et al, above n 27, 676; Wiist, above n 29; David Stuckler and Marion Nestle, 'Big Food, Big Systems and Global Health' (2012) 9(6) *PLoS Medicine* e1001242
<<http://www.plosmedicine.org/article/info%3Adoi%2F10.1371%2Fjournal.pmed.1001242>>.

³⁴ Moodie et al, above n 27, 676; Stuckler and Nestle, above n 33, 2.

³⁵ Monteiro, Gomes and Cannon, above n 31, 979; Stuckler and Nestle, above n 33, 3.

³⁶ See, e.g., Derek Yach, Antonio Lucio and Carlos Barroso, 'Can Food and Beverage Companies Help Improve Population Health? Some Insights From PepsiCo' (2007) 187(11-12) *Medical Journal of Australia* 656; Derek Yach et al, 'The Role and Challenges of the Food Industry in Addressing Chronic Disease' (2010) 6 *Globalisation and Health* 10.

³⁷ Moodie et al, above n 27, 675-676; Corinna Hawkes and Kent Buse, 'Public-Private Engagement for Diet and Health: Addressing the Governance Gap' (2011) 39(December) *SCN News* 6; Lois Dorfman et al, 'Soda and Tobacco Industry Corporate Social Responsibility Campaigns: How Do They Compare?' (2012) 9(6) *PLoS Medicine* e1001241, 4
<<http://www.plosmedicine.org/article/info%3Adoi%2F10.1371%2Fjournal.pmed.1001241>>.

³⁸ Jonathan Gornall, 'Doctors and the Alcohol Industry: An Unhealthy Mix?' (2013) 346 *British Medical Journal* 2 <<http://www.bmj.com/content/346/bmj.f1889?ijkey=XcDtz4WUWCWZoLp&keytype=ref>>.

³⁹ Michelle M Mello, David M Studdert and Troyen A Brennan, 'Obesity - The New Frontier of Public Health Law' (2006) 354(24) *New England Journal of Medicine* 2601, 2607; Andrew Lansley, 'The Role of Business in Public Health' (2011) 377(9760) *The Lancet* 121.

⁴⁰ Tara Acharya et al, 'The Current and Future Role of the Food Industry in the Prevention and Control of Chronic Diseases: The Case of PepsiCo' in David Stuckler and Karen Siegel (eds), *Sick Societies: Responding to the Global Challenges of Chronic Disease* (Oxford University Press, 2011) 187, 191.

⁴¹ See, e.g., Perviz Asaria et al, 'Chronic Disease Prevention: Health Effects and Financial Costs of Strategies to Reduce Salt Intake and Control Tobacco Use' (2007) 370(9604) *The Lancet* 2044; FJ He and GA MacGregor, 'Salt Intake, Plasma Sodium and Worldwide Salt Reduction' (2012) 44(Suppl 1) *Annals of Medicine* S127.

Collaborative approaches also grant access to industry expertise, technology and financial resources.⁴² Thus, industry funding can ‘plug the gaps’ left by the state in health policy, particularly in light of rising healthcare costs.⁴³ Recognising the ‘inconvenient truth’ of the need to collaborate with industry, researchers and health agencies have developed guidelines for effective private-public partnerships.⁴⁴ Box 3 below outlines these recommendations, bearing in mind that governance structures necessarily differ depending on the issue at hand and the risks for each party in the partnership.⁴⁵ Following the approach taken in Chapter 4, this model draws upon empirical and theoretical studies of regulation as well as public health literature.

⁴² Vivica I Kraak and Mary Story, 'A Public Health Perspective on Healthy Lifestyles and Public-Private Partnerships for Global Childhood Obesity Prevention' (2010) 110(2) *Journal of the American Dietetic Association* 192, 193; Leslie Pray and Laura Pillsbury, *Building Public-Private Partnerships in Food and Nutrition: Workshop Summary* (National Academies Press, 2012) 10.

⁴³ Elizabeth Majestic, 'Public Health's Inconvenient Truth: The Need to Create Partnerships with the Business Sector' (2009) 6(2) *Preventing Chronic Disease* 1, 3.

⁴⁴ *Ibid*; Buse and Harmer, above n 31; Pray and Pillsbury, above n 42, ch 3; World Health Organisation, *Guidelines on Working with the Private Sector to Achieve Health Outcomes*, Executive Board, 107th sess, Provision Agenda Item 8.3, WHO Doc EB107/20 (30 November 2002); United Nations System Standing Committee on Nutrition, *A Draft Proposal for Initiating SCN Private Sector Engagement* (12 February 2007) <http://www.unsystem.org/SCN/Publications/html/private_sector.htm>; Kent Buse and Sonja Tanaka, 'Global Public-Private Health Partnerships: Lessons Learned from Ten Years of Experience and Evaluation' (2011) 61(Suppl 2) *International Dental Journal* 2.

⁴⁵ Hawkes and Buse, 'Public-Private Engagement for Diet and Health', above n 37, 7.

Box 3. Recommendations for effective collaborative initiatives

- Allow a wide range of stakeholders to participate in regulatory processes, including industry, NGO and government representatives;⁴⁶
- Ensure that all participants are equally involved in standards implementation and development, with each party holding equal decision-making power;⁴⁷
- Create guidelines that identify suitable partners for collaboration and manage conflicts of interest;⁴⁸
- Formalise the terms of engagement in written contracts that clearly describe the roles and responsibilities of each party;⁴⁹
- Commit the necessary resources for the scheme to carry out its planned activities;⁵⁰
- Set clear objectives and targets for participants to meet within a given timeframe;⁵¹
- Make regulatory processes transparent by granting all parties full access to relevant information and documents;⁵²
- Maintain the independence of the scheme, for example by resourcing it through a government grant and using independent organisations in monitoring and audit activities;⁵³
- Make procedures available for dispute resolution;⁵⁴
- Monitor participants' performance and provide for independent third-party evaluation of the scheme's success;⁵⁵ and
- Create credible sanctions for non-compliance and incentives for compliance.⁵⁶

⁴⁶ Lars H Gulbrandsen, 'Overlapping Public and Private Governance: Can Forest Certification Fill the Gaps in the Global Forest Regime?' (2004) 4(2) *Global Environmental Politics* 75, 83; Kernaghan Webb, 'Understanding the Voluntary Codes Phenomenon' in Kernaghan Webb (ed), *Voluntary Codes: Private Governance, the Public Interest and Innovation* (Carleton Research Unit for Innovation, Science and Environment, Carleton University, 2004) 2, 14.

⁴⁷ Bostrom, above n 1; Buse and Harmer, above n 31, 269; Benjamin Cashore et al, 'Can Non-State Governance "Ratchet Up" Global Environmental Standards? Lessons from the Forest Sector' (2007) 16(2) *RECIEL* 158, 161; Lisa L Sharma, Stephen P Teret and Kelly D Brownell, 'The Food Industry and Self-Regulation: Standards to Promote Success and to Avoid Public Health Failures' (2010) 100(2) *American Journal of Public Health* 240, 241.

⁴⁸ Kraak et al above n 31, 510; Buse and Harmer, above n 31, 269.

⁴⁹ Ibid.

⁵⁰ Buse and Harmer, above n 31, 266-267.

⁵¹ Anna Bryden et al, 'Voluntary Agreements Between Government and Business: A Scoping Review of the Literature with Specific Reference to the Public Health Responsibility Deal' (2013) 110(2) *Health Policy* 186, 194.

⁵² Buse and Harmer, above n 31, 265; David Fuchs, Agni Kalfagianni and Tetty Havinga, 'Actors in Private Food Governance: The Legitimacy of Retail Standards and Multistakeholder Initiatives with Civil Society Participation' (2011) 28(3) *Agriculture and Human Values* 353, 357-358.

⁵³ David Cohen, 'The Role of the State in a Privatised Regulatory Environment' in Kernaghan Webb (ed), *Voluntary Codes: Private Governance, the Public Interest and Innovation* (Carleton Research Unit for Innovation, Science and Environment, Carleton University, 2004) 46, 29; S Prakash Sethi and Olga Emelianova, 'A Failed Strategy of Using Voluntary Codes of Conduct by the Global Mining Industry' (2006) 6(3) *Corporate Governance* 226, 230.

⁵⁴ Bostrom, above n 1, 360; Bryne Purchase, 'The Political Economy of Voluntary Codes' in Kernaghan Webb (ed), *Voluntary Codes: Private Governance, the Public Interest and Innovation* (Carleton Research Unit for Innovation, Science and Environment, Carleton University, 2004) 77, 89; Lars H Gulbrandsen, 'Accountability Arrangements in Non-State Standards Organisations: Instrumental Design and Imitation' (2008) 15(4) *Organisation* 563, 567.

⁵⁵ Buse and Harmer, above n 31, 269; Gulbrandsen, 'Overlapping Public and Private Governance,' above n 46, 83; Kraak and Story, above n 42; 196-197; Neil Gunningham, 'Environment, Self-Regulation and the Chemical Industry: Assessing Responsible Care' (1995) 17(1) *Law and Policy* 57, 72-74.

⁵⁶ Bryden et al, above n 51, 193; Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, 1992) 39; Andrew A King and Michael J Lenox, 'Industry Self-

In light of the growth in collaborative public health initiatives, this chapter explores whether food industry self-regulation could be improved by enhancing external stakeholder participation in regulatory processes. Public health groups question the credibility of self-regulation as an obesity prevention measure, given the numerous flaws in the RCMI and QSRI and the fact that the codes do little to reduce children's exposure to unhealthy food advertising.⁵⁷ At the same time, the independent review of the scheme found that code participants were frustrated at not receiving due recognition for attempting to change their marketing practices.⁵⁸ Signatories felt that they experienced sustained, negative criticism from public health groups without any acknowledgement of their genuine efforts to behave responsibly in marketing to children.⁵⁹ The independent reviewer recommended that the industry engage with external stakeholders and address their concerns if it wanted to improve the credibility of self-regulation and build trust with public health advocates and the wider community.⁶⁰ For example, the Australian Food and Grocery Council (AFGC) could consult with public health groups and other external stakeholders when revising the terms of the RCMI and QSRI or consider public health representation on an independent code management committee. The question, though, is whether this would strengthen the scheme in a manner that achieves public health outcomes, and also whether it would further the interests of participating public health organisations. To begin answering these questions, I examine how public health actors currently influence and interact with food and alcohol industry self-regulation in Australia.

Regulation Without Sanctions: The Chemical Industry's Responsible Care Program' (2000) 43(4) *Academy of Management Journal* 698, 714.

⁵⁷ See, e.g., Lana Hebden et al, 'Industry Self-regulation of Food Marketing to Children: Reading the Fine Print' (2010) 21(3) *Health Promotion Journal of Australia* 229; Michele Roberts et al, 'Compliance with Children's Television Food Advertising Regulations in Australia' (2012) 12(1) *BMC Public Health* 846; J Lumley, J Martin and N Antonopoulos, 'Exposing the Charade: The Failure to Protect Children from Unhealthy Food Advertising' (Obesity Policy Coalition, 2012) <<http://www.opc.org.au/paper.aspx?ID=exposing-the-charade&Type=policydocuments>>; L Wallard et al, 'The Takeaway on Fast-Food Meals: A Summary of Three Fast-Food Studies in Australia' (Cancer Council NSW, 2012) <<http://www.cancercouncil.com.au/68145/news-media/latest-news-news-media/cc-news/fast-food-exposing-the-truth/?pp=68145>>.

⁵⁸ Susannah Tymms, 'Responsible Advertising to Children: An Independent Review of the Australian Food and Beverage Industry Self-Regulatory Codes' (AFGC, October 2012) 44 <<http://www.afgc.org.au/industry-codes/advertising-to-children/rcmi/rcmi-reports-2009.html>>

⁵⁹ Ibid.

⁶⁰ Ibid.

2. Public health advocacy and food industry self-regulation

Influencing the RCMI and QSRI indirectly

Australian public health organisations pursue stronger restrictions on unhealthy food advertising to children as part of their obesity prevention platforms.⁶¹ State and federal Cancer Councils that originally campaigned on tobacco control now target unhealthy eating and physical inactivity,⁶² following evidence of a link between obesity and cancer.⁶³ Chronic disease prevention groups also take an interest in obesity policy (including the Public Health Association⁶⁴ and the Heart Foundation⁶⁵), as do research institutes, health professionals and academics. Many health organisations work across tobacco, alcohol and obesity, given that these are the three main preventable causes of non-communicable disease.⁶⁶ Participants in my study advocated a wide range of actions to address the social, economic and cultural elements of the obesogenic environment.⁶⁷ Interviewees said that although advertising restrictions could make a small (but significant) contribution to changing children's consumption patterns, such measures were more effective as part of a multi-faceted approach to obesity prevention. For example, a senior executive from one health advocacy group described its policy approach in the following terms:

⁶¹ See, e.g., Lumley, Martin and Antonopoulos, above n 57; Wallard et al, above n 57; Boyd Swinburn et al, 'The "Sydney Principles" for Reducing the Commercial Promotion of Foods and Beverages to Children' (2008) 11(9) *Public Health Nutrition* 881.

⁶² Ibid. See also Cancer Council Victoria, *Diet* (2011) <<http://www.cancervic.org.au/preventing-cancer/healthy-diet>>; Cancer Council NSW, *Eating and Moving* (2012) <<http://www.cancercouncil.com.au/reduce-risks/eating-moving/>>.

⁶³ Eugenia E Calle and Rudolf Kass, 'Overweight, Obesity and Cancer: Epidemiological Evidence and Proposed Mechanisms' (2004) 4(8) *Nature Reviews Cancer* 579; Australian Institute of Health and Welfare, 'Australia's Health 2012'. Australia's Health Series No 13. Cat No AUS 156 (AIHW, 2012) 209 <<http://www.aihw.gov.au/publication-detail/?id=10737422172>>.

⁶⁴ Public Health Association Australia, *Promoting Healthy Weight: The Prevention and Management of Overweight and Obesity in Australia Policy* (2010) <http://www.phaa.net.au/documents/policy/101215_Promoting%20Healthy%20Weight%20Policy.pdf>.

⁶⁵ Heart Foundation, *Championing Hearts (2008-2012)* (July 2010) 9 <<http://www.heartfoundation.org.au/SiteCollectionDocuments/Championing-hearts-mid-strategy-report-July-2010.pdf>>.

⁶⁶ See, e.g., R Beaglehole and D Yach, 'Globalisation and the Prevention and Control of Non-Communicable Disease: The Neglected Chronic Diseases of Adults' (2003) 362(9387) *The Lancet* 903; Stephen J Begg et al, 'Burden of Disease and Injury in Australia in the New Millennium: Measuring Health Loss from Diseases, Injuries and Risk Factors' (2008) 188(1) *Medical Journal of Australia* 36; National Preventative Health Taskforce, 'Australia: The Healthiest Country by 2020. National Preventative Health Strategy - Overview' (Australian Government, 2009) 7 <<http://www.preventativehealth.org.au/internet/preventativehealth/publishing.nsf/Content/national-preventative-health-strategy-11p>>.

⁶⁷ Boyd Swinburn, Garry Egger and Fezeela Raza, 'Dissecting Obesogenic Environments: The Development and Application of a Framework for Identifying and Prioritising Environmental Interventions for Obesity' (1999) 29(6) *Preventive Medicine* 563; G Sacks, B Swinburn and M Lawrence, 'Obesity Policy Action Framework and Analysis Grids for a Comprehensive Policy Approach to Reducing Obesity' (2009) 10(1) *Obesity Reviews* 76.

... over the last few years... we've... convinced the Federal government to be more strongly focused on prevention, and... that encompasses... a spectrum of issues from physical inactivity, poor nutrition and obesity and overweight... they're all interlinked, so we've got a fairly comprehensive approach that we take to those issues and... dealing with advertising of [unhealthy] foods and beverages to children is a critical part of our policy suite...

Public health groups stressed that their policy approach to food advertising was underpinned by a large body of research demonstrating a causal connection between unhealthy food marketing and childhood obesity.⁶⁸ In partnership with research organisations, health groups undertook their own studies on food advertising to children, which they used to extend the evidence base for their policy approach.⁶⁹ Researchers also analysed food industry self-regulation, including by measuring the nature and extent of food advertising on television before and after the introduction of the codes.⁷⁰ Interviewees conveyed the sense that they were 'filling in the gaps' left by an inadequate formal monitoring and oversight system. Consequently, public health groups played a critical role in providing government with evidence on the scheme's limited effectiveness in improving food marketing. However, interviewees said that they could perform this monitoring function only to a limited extent, given the time and resources required for this kind of research. Thus, they called for government to establish and fund an independent monitoring system to evaluate the initiatives' effects. ANPHA's work in this area will be discussed in the next chapter.⁷¹

Public health advocates acted as community representatives in the debate on food advertising to children. They undertook community polling to gauge the extent of public concern about

⁶⁸ As discussed in Chapter 1. See, e.g., Michael J McGinnis, Jennifer Gootman and Vivica I Kraak (eds), *Food Marketing to Children and Youth: Threat or Opportunity?* (National Academies Press, 2006) 183; Georgina Cairns, Kathryn Angus and Gerard Hastings, 'The Extent, Nature and Effects of Food Promotion to Children: A Review of the Evidence to December 2008' (World Health Organisation, 2009) <http://www.who.int/dietphysicalactivity/publications/marketing_evidence_2009/en/index.html>.

⁶⁹ See the discussion of these studies in Chapter 1. See, e.g., Bridget Kelly and Kathy Chapman, 'Food References and Marketing to Children in Australian Magazines: A Content Analysis' (2007) 22(4) *Health Promotion International* 284; Bridget Kelly et al, 'Internet Food Marketing on Popular Children's Websites and Food Product Websites in Australia' (2008) 11(11) *Public Health Nutrition* 1180; Bridget Kelly et al, 'Trends in Food Advertising to Children on Free-To-Air Television in Australia' (2010) 35(2) *Australian and New Zealand Journal of Public Health* 131.

⁷⁰ Chapter 5 described this research in detail. See Lesley King et al, 'Industry Self-Regulation of Television Food Advertising: Responsible or Responsive?' (2011) 6(2 Part 2) *International Journal of Paediatric Obesity* e390 <<http://onlinelibrary.wiley.com/doi/10.3109/17477166.2010.517313/full>>; Lana Hebden et al, 'Advertising of Fast-Food to Children on Australian Television: The Impact of Industry Self-Regulation' (2011) 195(1) *Medical Journal of Australia* 20; Lesley King et al, 'Building the Case for Independent Monitoring of Food Advertising on Australian Television' (2012) (*FirstView Article*) *Public Health Nutrition* 1 <<http://journals.cambridge.org/action/displayAbstract?fromPage=online&aid=8706977>>.

⁷¹ See Australian National Preventive Health Agency, *Draft Frameworks for Monitoring Television Marketing and Advertising to Children of Unhealthy Food and Drinks* (13 May 2013) <<http://anpha.gov.au/internet/anpha/publishing.nsf/Content/draft-frameworks-tv-marketing-children>>.

food advertising, and educated and informed community members on existing forms of regulation. The representative of one health organisation described how its advocacy efforts gave voice to public opinion on unhealthy food advertising to children:

... advocacy is a key role of what we do as an organisation, and because we have those strong reaches into the community... we have those ways that we can tap into the community and understand their needs, whether it's through doing properly conducted research studies about what are parents' views on these issues [or] getting them involved through our advocacy campaigns...

Some public health groups formed organisations to foster community involvement in advocacy on restricting food advertising to children. For example, Cancer Council Australia, Diabetes Australia (Victoria), the Australian and New Zealand Obesity Society, VicHealth and YCMA Victoria funded the Parents Jury, an online forum of parents, grandparents and carers with an interest in improving the food and physical activity environment of Australian children.⁷² Public health organisations also formed the Coalition on Food Advertising to Children (CFAC) to advocate for improvements in regulation of food marketing to children.⁷³ In 2007, the CFAC ran the 'Pull the Plug' Campaign, where members of the public filled out postcards expressing their concern about televised food advertising to children and calling for extensions to the *Children's Television Standards 2005* (CTS 2005). During the review of the CTS 2005, CFAC presented the ACMA with 20,521 signed postcards, along with a submission proposing that food and beverage advertising be prohibited during programs where children made up a significant proportion of the viewing audience.⁷⁴ However, public health advocates were unsuccessful in convincing the ACMA to strengthen restrictions on food advertising to children, underscoring the point that statutory restrictions in this area are unlikely, at least in the form proposed by public health advocates.

Public health groups used these and similar campaigns to mobilise community concern around food advertising, to critique industry self-regulation and to challenge the food

⁷² The Parents' Jury, *About Us* (2011) <<http://www.parentsjury.org.au/about-us>>.

⁷³ Cancer Council NSW, *Coalition on Food Advertising to Children* (2012) <<http://www.cancercouncil.com.au/1929/reduce-risks/eating-moving/food-advertising/cfac/?pp=36572>>. See also Coalition on Food Advertising to Children, *Children's Health or Corporate Wealth? The Case for Banning Television Food Advertising to Children* (January 2007) <http://www.cfac.net.au/food_marketing_child.htm>.

⁷⁴ Coalition on Food Advertising to Children, Submission to Australian Communications and Media Authority, *Children's Television Standards Review* (August 2007) <<http://www.cfac.net.au/readmore.html#submissions>>; Cancer Council NSW, *Pull the Plug on Food Advertising* (2012) <<http://www.cancercouncil.com.au/28264/reduce-risks/eating-moving/food-advertising/pull-the-plug/?pp=904>>.

industry's claim that it has a legitimate right to advertise its products to children.⁷⁵ Public health advocacy illustrates how activist pressure plays an on-going role in the regulatory system, as well as in the adoption of self-regulation in the first instance. NGO action ensures that voluntary schemes remain in the public eye and a topic of government attention, as well as placing pressure on industry to 'ratchet up' standards in existing voluntary programs.⁷⁶ In some cases activist groups can function as de facto regulators and enforcers, shaming and pressuring companies into compliance.⁷⁷ Health organisations also play an important monitoring and oversight role, particularly given the significant flaws in the AFGC's reporting on compliance with the codes (discussed in Chapters 5 and 7),⁷⁸ as well as limited government oversight of the scheme.

Engaging directly with self-regulation

As discussed in Chapter 7, the terms of the RCMI and QSRI create scope for direct public health engagement with food industry self-regulation. One of the main routes for advocates to participate in the scheme is via the advertising complaints hearing process.⁷⁹ A number of health organisations investigated breaches of the initiatives and laid complaints with the Advertising Standards Board (ASB). This mirrors the actions of Australian tobacco control advocates in challenging the legitimacy of the *Voluntary Code for Advertising Cigarettes in Australia*, which operated in the 1970s prior to legislative bans on tobacco marketing.⁸⁰ Under the auspices of MOP UP (Movement Opposed to the Promotion of Unhealthy Products), health activists complained to the Advertising Standards Council (the complaints hearing body under Australia's previous advertising self-regulatory system) that a Winfield

⁷⁵ ICC Commission on Marketing and Advertising, *Framework for Responsible Food and Beverage Marketing Communications 2012* (2012) 3 International Chamber of Commerce <<http://www.iccwbo.org/Advocacy-Codes-and-Rules/Document-centre/2012/Framework-for-Responsible-Food-and-Beverage-Marketing-Communications-2012/>>.

⁷⁶ Bartley, above n 4, Cashore et al, 'Can Non-State Governance "Ratchet Up" Global Environmental Standards? Lessons from the Forest Sector,' above n 47.

⁷⁷ Neil Gunningham, Dorothy Thornton and Robert A Kagan, 'Motivating Management: Corporate Compliance in Environmental Protection' (2005) 27(2) *Law & Policy* 289, 337.

⁷⁸ Australian Food and Grocery Council, *Food and Beverage Advertising to Children: Activity Report* (December 2010) <<http://www.afgc.org.au/industry-codes/advertising-kids/rcmi-reports-2009.html>>; Australian Food and Grocery Council, *Food and Beverage Advertising to Children: Activity Report* (May 2012) <<http://www.afgc.org.au/industry-codes/advertising-to-children/rcmi/rcmi-reports-2009.html>>.

⁷⁹ Australian Food and Grocery Council, *The Responsible Children's Marketing Initiative of the Australian Food and Beverage Industry* (March 2011) 3 <<http://www.afgc.org.au/industry-codes/advertising-to-children/rcmi.html>>; Australian Quick Service Restaurant Industry, *Initiative for Responsible Advertising and Marketing to Children* (June 2009) cl 6.3. Australian Association of National Advertisers <<http://www.aana.com.au/QuickServiceRestaurantInitiative.htm>>.

⁸⁰ Simon Chapman, 'A David and Goliath Story: Tobacco Advertising and Self-Regulation in Australia' (1980) 281(6249) *British Medical Journal* 1187.

campaign featuring Australian actor Paul Hogan had major appeal to children, in breach of the tobacco industry's code.⁸¹ In a significant coup for public health activists, the Council upheld the complaint 18 months after it was first laid (in November 1978), leading to the withdrawal of the campaign and positive media coverage of the activist group.⁸²

Public health groups similarly used complaints to expose non-compliance with food advertising initiatives, and also as 'test cases' to demonstrate loopholes in the codes and in the complaints hearing mechanism itself. For example, the Obesity Policy Coalition has made complaints about food marketing to the Australian Competition and Consumer Commission, the ACMA and the ASB.⁸³ It reports the determinations on its website and uses them in policy briefs on food advertising regulation.⁸⁴ However, the ASB views these complaints as troublesome, and an illegitimate use of the complaints hearing mechanism.⁸⁵ In the independent review of food industry self-regulation, the ASB said that public health organisations deliberately made complaints that they knew it would dismiss.⁸⁶ Although these complaints demonstrated the limitations of the RCMI and QSRI, the ASB felt that they were a waste of its resources.⁸⁷ I interviewed a representative of the Advertising Standards Bureau who also felt that public health complaints were not representative of wider public concern about food advertising to children:

... there's a lot of concern in the media [about childhood obesity and food advertising]... and by particular lobby groups...[but] no one knows how much that actually is represented in the community ...with [the] new codes... I'd say at least 90% of the complaints come from organised consumer lobby groups... which isn't to say lobby groups...don't have...a role, but...people off the street aren't... writing in to complain to us... [about breaches of the RCMI and QSRI].

However, in common with other researchers, I argue that it is virtually impossible for members of the public to make complaints about food advertising under the RCMI and QSRI.⁸⁸ The codes are extremely complex and technical, making it difficult to identify advertisements that breach their terms. Further, most people probably do not even know the

⁸¹ Ibid.

⁸² Ibid 1189-1190.

⁸³ Obesity Policy Coalition, *Complaints* (undated) <<http://www.opc.org.au/whatwedo/complaints.aspx>>.

⁸⁴ Obesity Policy Coalition, *Policy Brief: Food Advertising Voluntary Codes* (June 2012) 2-3 <http://www.opc.org.au/downloads/Food_advertising_voluntary_codes_policy_brief_June_2012.pdf>.

⁸⁵ Tymms, above n 58, 46.

⁸⁶ Ibid

⁸⁷ Ibid.

⁸⁸ Lumley, Martin and Antonopoulos, above n 57, 15.

initiatives exist, particularly considering that the AFGC gives them little publicity.⁸⁹ The advertising industry argues that the small number of complaints received by the ASB shows that self-regulation prevents the majority of irresponsible advertising.⁹⁰ What is more likely is that individuals face significant barriers when attempting to make complaints under advertising codes of conduct, which deter them from doing so.⁹¹ This makes it all the more important that public health advocates lay complaints about food advertising, in order to challenge the argument that low numbers of complaints demonstrate the success of advertising self-regulation.

The RCMI provides for another form of public health participation in the complaints hearing mechanism. When the ASB makes a determination under the RCMI it must decide whether the advertised product meets signatory companies' criteria for 'healthy dietary choice' products.⁹² The AFGC contracts an independent arbiter to compare the advertised product to the nutritional criteria chosen by participants to identify healthier products.⁹³ The AFGC originally contracted Professor Bruce Neal (of the George Institute for Global Health) as the independent arbiter. Professor Neal resigned from this position, stating that the RCMI was too complex for the public to understand and that the program was unworkable and ineffective.⁹⁴ The independent arbiter performs a restricted role in the complaints hearing process and Professor Neal's experience suggests that the role does not allow for feedback on the scheme's operation. Accordingly, this position does not represent meaningful public health involvement in food industry self-regulation. Rather, the arbiter is engaged solely on the industry's own terms.

⁸⁹ See Chapter 7; Australian Communications and Media Authority, 'Industry Self-Regulation of Children's Food and Beverage Advertising: ACMA Monitoring Report' (Australian Government, 2011) 25 <<http://engage.acma.gov.au/kids-food-ads/>>.

⁹⁰ See Australian Association of National Advertisers, Submission No 17 to House Standing Committee on Social Policy and Legal Affairs, *Inquiry into the Regulation of Billboard and Outdoor Advertising*, 15 February 2011, 20

<http://www.aph.gov.au/parliamentary_business/committees/house_of_representatives_committees?url=spla/outdoor%20advertising/subs.htm>; House Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, *Reclaiming Public Space: Inquiry into the Regulation of Billboard and Outdoor Advertising* (July 2011) 96

<http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=spla/outdoor%20advertising/report.htm>.

⁹¹ Lumley, Martin and Antonopoulos, above n 57, House Standing Committee on Social Policy and Legal Affairs, above n 90, 96

⁹² Australian Food and Grocery Council, *Responsible Children's Marketing Initiative 2010 Compliance Report* (2010) 6 <<http://www.afgc.org.au/industry-codes/advertising-kids.html>>.

⁹³ The current arbiter is the The Nutritional Physiology Research Centre at the University of South Australia (ibid).

⁹⁴ Julian Lee, 'Junk Food Codes Fail, Says Doctor', *Sydney Morning Herald* (online) 10 September 2010 <<http://www.smh.com.au/business/media-and-marketing/junk-food-codes-fail-says-doctor-20100909-1536n.html>>.

Chapter 7 described how the RCMI and QSRI provide for independent third-party monitoring and evaluation. The Healthy Kids Association (HKA) reviewed QSRI signatories' advertising against the terms of the code during two separate audit periods, one in 2010 and one in 2011.⁹⁵ In 2012 the AFGC contracted a consultant to assess the management, implementation and monitoring of the two codes.⁹⁶ External monitoring and review is one of the strengths of food industry self-regulation, but there are significant limitations in the review framework. For example, the 2012 evaluation focused on the regulatory processes established by the codes rather than their substantive outcomes, such as whether they led to a reduction in children's exposure to unhealthy food advertising. As a result, the review did not comment on the real-world impact of the codes on the food marketing environment.⁹⁷

Further, by engaging a consultant to perform the review, the AFGC missed an opportunity to involve external stakeholders in the codes' governance processes.⁹⁸ A more credible form of review would involve an independent body comprised of representatives from public health organisations and other interested parties, and would measure the codes' success against well-defined, quantifiable and outcome-based performance indicators.⁹⁹ In summary, public health organisations have had little discernible impact on food industry self-regulation as participants in regulatory processes; although this chapter and Chapter 8 suggest that their advocacy was a source of pressure on the industry to adopt advertising self-regulation, and to comply with voluntary standards once they were in place.

3. Public health advocacy and alcohol industry self-regulation

Indirectly influencing the ABAC Scheme

Many public health organisations are involved in alcohol policy advocacy alongside their work in obesity prevention,¹⁰⁰ while other groups deal solely with alcohol harm prevention.¹⁰¹ Alcohol policy advocates seek to address all aspects of alcohol sales and promotion in order

⁹⁵ Healthy Kids Association, *Final Report on the Compliance of Signatories to the Australian Quick Service Restaurant Industry Initiative for Responsible Advertising to Children* (October 2011) 7-8 Australian Food and Grocery Council <<http://www.afgc.org.au/tools-guides-.html>>.

⁹⁶ Tymms, above n 58, 31.

⁹⁷ Ibid.

⁹⁸ See Luc W Fransen and Ans Kolk, 'Global Rule-Setting for Business: A Critical Analysis of Multi-Stakeholder Standards' (2007) 14(5) *Organisation* 667.

⁹⁹ See Gunningham, above n 55, 72-74; Sethi and Emelianova, above n 53, 231; Tymms, above n 58, 63.

¹⁰⁰ See, e.g., Corinne Dobson, *Alcohol Marketing and Young People: Time for a New Policy Agenda* (2012) Australian Medical Association <<https://ama.com.au/alcohol-marketing-and-young-people>>.

¹⁰¹ See, e.g., Australian Drug Foundation, *Community Alcohol Action Network* (2010) <<http://www.adf.org.au/policy-advocacy/community-alcohol-action-network>>.

to modify the demand for, and reduce the harms associated with, excessive alcohol consumption.¹⁰² This includes measures such as pricing and taxation, restricting the availability of alcohol, education and persuasion strategies, as well as the regulation of alcohol marketing.¹⁰³ Alcohol policy groups also discussed the importance of ensuring that their policy platform reflected community views on alcohol advertising and promotion. One interviewee described how her organisation wanted to ensure that its policy positions were:

... not only informed by a range of experts, but also informed by what different community representatives feel about different topics... so we do a lot of community polling... talking to all stakeholders, so not just our public health friends, but also the alcohol industry...so that we get an understanding of whether the things we're suggesting are actually realistic or idealistic...

Another interviewee said that there was little public awareness of the ABAC Scheme, meaning that one of public health organisations' key functions was publicising the ABAC's existence, as well as its flaws.

The same interviewee discussed the National Preventative Health Taskforce's recommendations on regulation of alcohol marketing and sponsorship.¹⁰⁴ The Taskforce recommended phasing out alcohol promotions from television broadcasts that have high exposure to young people, including advertising during live sports broadcasts, during time periods with large youth audiences and sponsorship of sports and cultural events.¹⁰⁵ The Federal government responded by saying that it would not regulate at present, but tasked ANPHA with monitoring alcohol advertising to young people.¹⁰⁶

ANPHA recently released an issues paper on the ABAC, following the Taskforce's recommendation that it monitor and evaluate voluntary approaches to alcohol promotion.¹⁰⁷ This paper described research on alcohol marketing and its impact upon young people's

¹⁰² See, e.g., National Alliance for Action on Alcohol, *Reducing Harm from Alcohol: Creating a Healthier Australia* (undated) <<http://www.phaa.net.au/documents/NAAA%20Position%20Statement%20-%20Dec%202011.pdf>>; Wendy Loxley et al, 'Alcohol Policy and Harm Reduction in Australia' (2005) 24(6) *Drug and Alcohol Review* 559.

¹⁰³ Ibid.

¹⁰⁴ See National Preventative Health Taskforce, 'National Preventative Health Strategy – Overview', above n 66, 22.

¹⁰⁵ Ibid.

¹⁰⁶ Australian Government, 'Taking Preventative Action. A Response to Australia: The Healthiest Country by 2020, the Report of the National Preventative Health Taskforce' (Australian Government, 2010) 95 <<http://www.preventativehealth.org.au/>>.

¹⁰⁷ National Preventative Health Taskforce, 'National Preventative Health Strategy – Overview', above n 66, 22; Australian National Preventive Health Agency, *Alcohol Advertising: The Effectiveness of Current Regulatory Codes in Addressing Community Concerns. Issues Paper* (December 2012) <<http://www.anpha.gov.au/internet/anpha/publishing.nsf/Content/alcohol-advertising-issues-paper-html>>.

alcohol consumption, and the current system for regulating alcohol advertising in Australia. It also called for public submissions on the effectiveness of the ABAC in addressing community concerns about young people's exposure to alcohol advertising. The interviewee said that her organisation would watch the government's response to the Taskforce and demand action on alcohol advertising regulation if the government did not act. Other interviewees felt that the government had failed to take a leadership role regulation of alcohol advertising and in alcohol policy more broadly. Accordingly, it was important for public health groups to devise policy approaches to propose to government, and to hold government accountable for its commitments. However, in advocating for effective policy options they faced strong resistance from powerful industry lobbyists.¹⁰⁸

Participating in regulatory processes

Public health organisations participated in the ABAC Scheme by making complaints to the ABAC Adjudication Panel about alcohol advertising.¹⁰⁹ The majority of complaints to the Panel are made on a confidential basis.¹¹⁰ Those that identify the complainant(s) include submissions from the Alcohol Policy Coalition, the WA Community Alcohol Network, Cancer Council WA and the McCusker Centre for Action on Alcohol and Youth,¹¹¹ as well as from individual alcohol policy researchers.¹¹² A representative from the ABAC Management Committee referred to what he called 'professional complainants', i.e. anti-alcohol advocates who monitored alcohol advertising to identify advertisements that they could lay complaints about. An interviewee from one of the alcohol trade associations took issue with public health complaints to the Panel, arguing that they did not reflect wider community concern about alcohol advertising:¹¹³

¹⁰⁸ See also Daube, above n 13, 109; David Miller and Claire Harkins, 'Corporate Strategy, Corporate Capture: Food and Alcohol Industry Lobbying and Public Health' (2010) 30(4) *Critical Social Policy* 564.

¹⁰⁹ The ABAC Scheme Limited, *About the ABAC Scheme* (undated) <<http://www.abac.org.au/about/>>.

¹¹⁰ For complaint determinations under the ABAC, see The ABAC Scheme Limited, *Adjudication Decisions* (undated) <<http://www.abac.org.au/adjudication/>>.

¹¹¹ See, e.g., ABAC Complaints Panel, *Determination No: 63/09, 66/09, 72/09* (21 October 2009) <<http://www.abac.org.au/adjudication/63-09/>>; ABAC Complaints Panel, *Determination No: 8/10* (12 March 2010) <<http://www.abac.org.au/adjudication/8-10/>>; ABAC Complaints Panel, *Determination No: 83/10* (24 December 2010) <<http://www.abac.org.au/adjudication/83-10/>>; ABAC Complaints Panel, *Determination No: 22/11* (25 March 2011) <<http://www.abac.org.au/adjudication/22-11/>>.

¹¹² ABAC Complaints Panel, *Determination No: 37/10* (14 October 2010) <<http://www.abac.org.au/adjudication/37-10/>>.

¹¹³ But see Colmar Brunton, *Alcohol Beverages Advertising (and Packaging) Code Scheme. Review of ABAC Decisions* (9 May 2013) 70-73 The ABAC Scheme Limited <<http://www.abac.org.au/publications/research/>>. This report evaluated whether ABAC complaint determinations were in line with community standards on alcohol advertising. An online survey of 1,261 Australians undertaken for the report found that a third (34 per cent) were concerned about alcohol advertising, predominantly because it normalised alcohol consumption or

... it's very easy to be misled by complaints... there is a profession out there who makes their life point to complain about... alcohol ads... they're very professional about how they go about it and you can be a bit misled as to what the community's expectations are if you're only looking at [those complaints].

In contrast to this interviewee, a representative from the ABAC Adjudication Panel said that it was perfectly legitimate for public health advocates to use complaints as a way of exposing the ABAC's limitations:

... I have seen a range of complaints from advocates... effectively testing the application of the code... I don't find that offensive in any way... while alcohol is a legal drug, it is to be used against a backdrop of responsible, moderate use... this scheme as imperfect as it is, is about ensuring that those public health goals are not undermined through inappropriate advertising... I have no difficulty with those... who live with, and treat the causes of alcohol [harms] complaining about individual ads and seeking to expand the interpretation or the reach or to knock out ads.

The ABAC Scheme enables greater external stakeholder participation in governance processes than food industry self-regulation, as I describe below. The alcohol industry created the contemporary version of the scheme in 1998, at which point it was almost entirely industry-based. The ABAC Management Committee (which administers the code) consisted of the Executive Directors of the three main alcohol industry bodies, as well as a representative of the Advertising Federation of Australia.¹¹⁴ The ABAC Adjudication Panel comprised five members, including a Chief Adjudicator and four other members with expertise in marketing and/or a background in the media industry.¹¹⁵

In 2003, the Ministerial Council for Drug Strategy led a review of the scheme, conducted by the National Committee for the Review of Alcohol Advertising (NCRAA).¹¹⁶ The NCRAA reported that the ABAC Scheme did not address public health concerns about alcohol advertising, partly because of a number of weaknesses in the complaints hearing mechanism. For example, the majority of complaints were dealt with under the ASB's complaint resolution system rather than the ABAC, the general public was largely unaware of the scheme and how to make complaints, and there was insufficient reporting of how complaints were adjudicated and the outcomes of those complaints.¹¹⁷ The NCRAA concluded that

promoted irresponsible drinking patterns. See also The ABAC Scheme Limited, *Summary and ABAC Response to the Review of the ABAC Decision Report* (17 June 2013) <<http://www.abac.org.au/publications/research/>>.

¹¹⁴ National Committee for the Review of Alcohol Advertising, 'Report to the Ministerial Council of Drug Strategy: Review of the Self-Regulatory System for Alcohol Advertising' (Minister for Health Victoria, 2003) 12 <[http://docs.health.vic.gov.au/docs/doc/2E4E141E5A719092CA2578A1000A1CB0/\\$FILE/ncraareport.pdf](http://docs.health.vic.gov.au/docs/doc/2E4E141E5A719092CA2578A1000A1CB0/$FILE/ncraareport.pdf)>.

¹¹⁵ Ibid 13. Three members of the Panel convene to hear each complaint.

¹¹⁶ Ibid. See also the discussion in Chapter 1.

¹¹⁷ Ibid v-vi.

although the ABAC Scheme was a ‘reasonable and viable system’, it had ‘considerable shortcomings that required redress’.¹¹⁸

Following negotiations with government, the alcohol industry rolled out changes to the ABAC between 2004 and 2005, as recommended by the NCRAA.¹¹⁹ The industry revised the terms of the code so that it contained a new preamble, specific provisions on internet advertising and a protocol for event-based promotion of alcohol beverages. It restructured the Management Committee to include a representative of the federal Department of Health and Ageing, with the goal of enhancing the Committee’s independence from industry and ensuring that it was ‘cognisant of public health issues’.¹²⁰ The alcohol industry also incorporated a public health expert in the ABAC Adjudication Panel.¹²¹ In 2007 the Management Committee appointed an additional public health representative to improve complaint response times.¹²²

The alcohol industry takes enormous pride in the ABAC Scheme, viewing it as an example of best practice in alcohol advertising regulation.¹²³ Alcohol industry participants discussed a number of government reviews that had reported favourably on the ABAC, for example the recent review of outdoor advertising regulation.¹²⁴ According to interviewees, the scheme’s strengths included the detailed decisions produced by the Adjudication Panel and the Panel’s independence from industry. Further, interviewees said although some companies were reluctant to withdraw or modify non-compliant advertisements, that there had never been a case where an ABAC participant had refused to abide by the Panel’s decision. The ABAC Management Committee representative also described the benefits of government involvement in the administration of the ABAC:

¹¹⁸ Ibid 25.

¹¹⁹ Ibid.

¹²⁰ Ibid 34.

¹²¹ Ibid ch 5.

¹²² Management Committee of the ABAC Scheme, *The ABAC Scheme Annual Report 2007* (2007) The ABAC Scheme <<http://www.abac.org.au/uploads/File/ABAC2007AnnualReport.pdf>>; The ABAC Scheme Limited, *The Development of Australia's Alcohol Beverages Advertising (and Packaging) Code* (undated) <http://www.dsica.com.au/content/detail/about_alcohol_alcohol_advertising_and_regulation>.

¹²³ See, e.g. Gordon Broderick (Distilled Spirits Industry Council of Australia), Stephen Strachan (Winemakers Federation of Australia) and Stephen Swift (Brewers Association of Australia and New Zealand), Submission No 49 to House Standing Committee on Social Policy and Legal Affairs, *Inquiry into the Regulation of Billboard and Outdoor Advertising*, 21 April 2011, 1 <http://www.aph.gov.au/parliamentary_business/committees/house_of_representatives_committees?url=spla/outdoor%20advertising/subs.htm>.

¹²⁴ Although the report of the review was more ambivalent than made out by interviewees. See House Standing Committee on Social Policy and Legal Affairs, above n 90, 81-87.

...we get a direct input as to the how the Ministry might be feeling about issues....also we get a different view, it's a more balanced view...we're dealing with alcohol all the time, so it is valuable to have some other views at the table...

However, researchers question whether health and government representation in the ABAC Scheme furthers public health objectives.¹²⁵ For example, a number of studies criticise the ABAC Adjudication Panel's decision making processes.¹²⁶ One study compared determinations on 14 alcohol advertisements made by the Panel, with the judgments of a six person panel of marketing, communications and public health experts.¹²⁷ The ABAC Adjudication Panel dismissed all but one of the advertisements, yet a majority of the independent panel thought that eight of the advertisements breached the ABAC and two did not (the panel was evenly split on the remaining four advertisements). The researchers concluded that the Adjudication Panel's views did not adequately reflect community standards on alcohol advertising, and that the scheme did not protect the community from inappropriate forms of alcohol advertising.¹²⁸ Researchers also question the ability of the Panel to be fully impartial in their determinations, given that members are paid a retainer plus an amount per complaint heard from funds provided by industry.¹²⁹ However, the panel members that I interviewed defended the complaints determination process, saying that complaints were determined in a genuine and robust fashion.¹³⁰

Public health interviewees thought that public health representation on the ABAC Adjudication Panel was relatively meaningless. Panel members typically reached consensus on the majority of decisions, but where there was dissent it tended to come from the public health representatives. However, because the majority of the panel were likely to back alcohol industry interests, the health representatives were always outvoted when they disagreed with other panel members. One of the health sector representatives on the Panel said that other panellists took a different approach to interpreting the ABAC than the health members and that arguing the public health case was 'not the most comfortable position' to

¹²⁵ See also Chapter 6, which describes limitations in the scope and coverage of the ABAC, as it applies to alcohol advertising that appeals to children and young people.

¹²⁶ Sandra C Jones and Robert J Donovan, 'Self-Regulation of Alcohol Advertising: Is It Working for Australia?' (2002) 2(3) *Journal of Public Affairs* 153; Sandra C Jones, Danika Hall and Geoffrey Munro, 'How Effective is the Revised Regulatory Code for Alcohol Advertising in Australia?' (2008) 27(1) *Drug and Alcohol Review* 29; Robert J Donovan, Lynda Fielder and Geoffrey Jalleh, 'Alcohol Advertising Advocacy Research No Match for Corporate Dollars: The Case of Bundy R Bear' (2011) 20 *Journal of Research for Consumers* 1.

¹²⁷ Jones, Hall and Munro, above n 126.

¹²⁸ *Ibid* 37.

¹²⁹ Donovan, Fielder and Jalleh, above n 126, 3.

¹³⁰ See also Colmar Brunton, above n 113; The ABAC Scheme Limited, *Summary and ABAC Response to the Review of the ABAC Decision Report*, above n 113.

be in. The inclusion of health representation on the Panel allows for public health opinions to be heard in the determination process, but the design of the scheme means that they cannot trump industry perspectives. Arguably, this imbalance of power is a more critical concern than the potential for bias in panel members' decision-making. A better approach would be for the Adjudication Panel to comprise a diverse range of representatives, with no one interest dominating its membership. More ideally, an entirely independent body would hear complaints about alcohol advertising under the ABAC.¹³¹

Alcohol policy researchers argue that the Federal government's oversight of the scheme is compromised by its financial ties with the alcohol industry, including income generated by taxes on alcohol beverages and donations to political parties.¹³² In essence, a situation of 'regulatory capture' exists, where there is cooperation between government and industry, rather than genuine co-regulation.¹³³ Public health interviewees suggested that there was limited evidence that the government representative had any ability to influence the scheme, particularly given that the majority of committee members were from the alcohol industry. One alcohol policy researcher expressed the view that:

... the government representative appears to play no role at all except turn up to Management Committee meetings... it seems that they are silent on those... meetings and tend to just stay out of it ... there's no evidence that they intervene on anything to do with alcohol policy....

The alcohol industry characterises the ABAC Scheme as quasi-regulatory because of government involvement in setting and revising the codes' standards, as well as public health representation in the complaints hearing mechanism.¹³⁴ However, public health interviewees challenged this characterisation of the ABAC, given that there was little evidence that the government had any meaningful influence over the scheme's operation and because it was largely ineffective. For example, one public health advocate said that:

... [the government representatives are] just members like everybody else. So I can't see that's co-regulation, because co-regulation would suggest that government has some sort of power to do something... [the] system... is entirely industry driven and industry governed and industry paid for, in which people sign up if they want to... and... if their ad is found to be in breach... they are not obliged to remove it, and there is no penalty... there's nothing quasi-regulatory about that at all... it's a self-regulation system... It has no teeth and it's not designed to have any teeth.

¹³¹ Jones, Hall and Munro, above n 126, 29.

¹³² Donovan, Fielder and Jalleh, above n 126, 10.

¹³³ Ibid.

¹³⁴ See The ABAC Scheme Limited, *About the ABAC Scheme* (undated) <<http://www.abac.org.au/about/>>.

Further, there is a lack of transparency in relation to the role played by the government representative on the ABAC Management Committee. While the ABAC's Rules and Procedures specify the inclusion of the representative on the Committee, they do not describe the role that this individual plays, or his or her influence in committee decision-making processes.¹³⁵ Literature on effective public-private partnerships suggests that collaborative arrangements should be clearly structured, formal and transparent, with all parties having real influence over the partnerships' outcomes.¹³⁶ Government participation in the ABAC Scheme represents none of these things, suggesting that it is unlikely to further public health objectives.

The creation of the Alcohol Advertising Review Board

In response to concerns about the ABAC Scheme, public health organisations recently established an alternative system for public complaints about alcohol advertising. The McCusker Centre for Action on Alcohol and Youth and the Cancer Council WA created the Alcohol Advertising Review Board (AARB) in March 2012, with the support of a wide range of other health organisations.¹³⁷ The AARB mimics the operation of the ABAC: it accepts complaints from members of the public about alcohol advertisements and invites advertisers to respond (within seven days) to the issues raised in the complaint. The AARB recruited nearly 70 individuals to be panellists on an independent Review Board that determines complaints, including professionals in the fields of law, public health, marketing and education.¹³⁸ Three members consider each complaint against two advertising codes; if the Panel upholds the complaint, the AARB will contact the advertiser and ask that they withdraw or modify the advertisement.¹³⁹ The AARB publishes the Board's determinations on its website¹⁴⁰ and prepares reports on the scheme's operation.¹⁴¹

¹³⁵ The ABAC Scheme Limited, *The ABAC Scheme: Rules and Procedures* (5 December 2012) cl 1. <<http://www.abac.org.au/publications/rules-procedures/>>.

¹³⁶ See Box 3 above. See also Chris Ansell and Alison Gash, 'Collaborative Governance in Theory and Practice' (2008) 18(4) *Journal of Public Administration Research* 543, 546.

¹³⁷ Alcohol Advertising Review Board, *About Us* (2012) <<http://www.alcoholadreview.com.au/about/>>.

¹³⁸ Melissa Sweet and Rebecca Johnson, 'Naming and Shaming Irresponsible Alcohol Advertisers' on *Croaky: The Crikey Health Blog* (9 August 2012) <<http://blogs.crikey.com.au/croakey/2012/08/09/naming-and-shaming-irresponsible-alcohol-advertisers/>>.

¹³⁹ Alcohol Advertising Review Board, *Procedures* (2012) <<http://www.alcoholadreview.com.au/about/procedures/>>.

¹⁴⁰ Alcohol Advertising Review Board, *Determination Reports* (2012) <<http://www.alcoholadreview.com.au/articles/determination-reports/>>.

¹⁴¹ See Alcohol Advertising Review Board, *Alcohol Advertising Review Board First Report March-June 2012* (2 August 2012) McCusker Centre for Action on Alcohol and Youth, Cancer Council Western Australia <<http://www.alcoholadreview.com.au/news/reports/>>; Alcohol Advertising Review Board, *Quarterly Report*

The AARB wrote its own *Alcohol Advertising Review Board Code*, consisting of separate content and placement codes. The *Content Code* is constructed from ‘best practice’ provisions contained in alcohol advertising codes in jurisdictions with self- or quasi-regulatory systems that are similar to the ABAC.¹⁴² It covers a broader range of advertising content than the ABAC, particularly in relation to advertising that appeals to young people.¹⁴³ These provisions are outlined in Box 4 below. The *Placement Code*, by contrast, ‘is a set of ideal provisions about where alcohol advertising should appear in the physical and online environments, so as to protect young people from excessive exposure’.¹⁴⁴ It prohibits the placement of alcohol advertisements in places or at broadcast times when young people are exposed or likely to be exposed, and in connection with content that appeals to young people (see also Box 4 below).¹⁴⁵ The *Placement Code* covers a significant loophole in the ABAC Scheme, i.e. its failure to regulate the placement of alcohol advertisements.¹⁴⁶

June-August 2012 (6 December 2012) McCusker Centre for Action on Alcohol and Youth, Cancer Council Western Australia <<http://www.alcoholadreview.com.au/news/reports/>>; Alcohol Advertising Review Board, *Quarterly Report September-November 2012* (12 February 2013) McCusker Centre for Action on Alcohol and Youth, Cancer Council Western Australia <<http://www.alcoholadreview.com.au/news/reports/>>; Alcohol Advertising Review Board, *Annual Report 2012-13* (11 June 2013) McCusker Centre for Action on Alcohol and Youth, Cancer Council Western Australia <<http://www.alcoholadreview.com.au/news/annual-reports/>>.

¹⁴² Alcohol Advertising Review Board, *The Code* (2012) <<http://www.alcoholadreview.com.au/about/the-code/>>; Melissa Sweet and Rebecca Johnson, 'Introducing a New Watchdog for Alcohol Marketing' on *Croakey: The Crikey Health Blog* (19 March 2012) <<http://blogs.crikey.com.au/croakey/2012/03/19/introducing-a-new-watchdog-for-alcohol-marketing/>>.

¹⁴³ Alcohol Advertising Review Board, *Alcohol Advertising Review Board Content and Placement Code* (2012) s 4(a) <<http://www.alcoholadreview.com.au/resources/Alcohol-Advertising-Review-Board-Content-and-Placement-Code-July-2012.pdf>>.

¹⁴⁴ Sweet and Johnson, 'Introducing a New Watchdog for Alcohol Marketing,' above n 142.

¹⁴⁵ See Alcohol Advertising Review Board, *Alcohol Advertising Review Board Content and Placement Code*, above n 143.

¹⁴⁶ See Chapter 6; Simone Pettigrew, Rebecca Johnson and Mike Daube, 'Introducing and Applying a New Australian Alcohol Advertising Code' (2012) 13(1) *Journal of Public Affairs* 72, 73.

Box 4. Provisions of the Alcohol Advertising Review Board Code that apply to advertising's appeal to young people¹⁴⁷

ALCOHOL ADVERTISING REVIEW BOARD CONTENT CODE

ALCOHOL-SPECIFIC PROVISIONS

a. Young people

- i. Alcohol advertisements shall not:
 1. be directed at, or have a strong or evident appeal to, Young People
 2. associate any Product with youth or youth symbols,
 3. portray Product in the context of, or in relation to, an activity attractive primarily to Young People; or
 4. Include a person or character whose example is likely to be followed by Young People or who has strong appeal to Young People
- ii. Adults appearing in Alcohol Advertisements must be over 25 years of age and be clearly depicted as adults of this age.

.....

ALCOHOL ADVERTISING REVIEW BOARD PLACEMENT CODE

1. Placement: General

Alcohol advertisements should not be placed:

- ii. In places or at broadcast times when Young People are exposed or likely to be exposed; or
- iii. In connection with content that appeals to Young People.

2. Television (free-to-air and pay TV)

Alcohol Advertisements shall not be broadcast between 5am and 9pm.

3. Radio

Alcohol Advertisements shall not be broadcast between 5am and 9pm.

4. Cinema

Alcohol Advertisements may only be shown during R18+ films.

5. Publications

Alcohol Advertisements are not permitted in publications that appeal or are likely to appeal to Young People. This provision does not apply to alcohol industry publications.

6. Outdoor

Alcohol Advertisements are not permitted within 500m of schools.

7. Transport advertising

No Alcohol Advertisements shall be placed on any means of public transport. No Alcohol Advertisements shall be placed at any train, tram, bus or ferry stops.

8. Internet

Alcohol Advertisements shall not appear online in connection with content that appeals or is likely to appeal to Young People.

9. Sponsorship

Alcohol Advertisements shall not appear at cultural or sporting events that appeal or are likely to appeal to Young People.

¹⁴⁷ Alcohol Advertising Review Board, Alcohol Advertising Review Board Content and Placement Code, above n 143.

In the AARB's first year of operation it received 200 complaints and made 145 determinations.¹⁴⁸ The AARB Review Board upheld 104 complaints in full, 32 in part and dismissed nine.¹⁴⁹ Nineteen companies refused to participate in the AARB process, but 13 provided the AARB with a written response to complaints about their products.¹⁵⁰ A handful of companies also took action to remedy non-compliant advertising. For example, Bacardi Lion removed a billboard from a bus shelter adjacent to a children's playground.¹⁵¹ Yet overall, the alcohol and advertising industries are extremely hostile to the AARB. The Australian Association of National Advertisers (AANA) called it 'a farce', and demanded that it be disbanded.¹⁵² According to the AANA, the existing advertising self-regulatory system adequately protected consumers.¹⁵³ Further, the AARB did not meet standards for good self-regulation, as the AARB had 'set themselves up as judge, jury and executioner': health organisations had established the scheme without community consultation, submitted anonymous complaints themselves and adjudicated on complaints using their own set of standards and members of their own networks.¹⁵⁴ The three main alcohol industry bodies referred to the AARB as a 'stunt'.¹⁵⁵ They said that in contrast to the ABAC (which had the support of government), the AARB lacked authority and would only serve to confuse the community.¹⁵⁶

The AARB can be viewed as a form of civil regulation, i.e. an attempt by public health organisations to impose their own standards of advertising on the alcohol industry.¹⁵⁷ It represents the reverse of the situation found in other areas of regulation, where industry organisations create self-regulation to challenge the operation of NGO-run schemes, or those proposed by governments and other organisations.¹⁵⁸ For example, as part of its corporate

¹⁴⁸ Alcohol Advertising Review Board, *Annual Report 2012-13*, above n 141, 1.

¹⁴⁹ *Ibid.*

¹⁵⁰ *Ibid.* 3.

¹⁵¹ See Alcohol Advertising Review Board, *Alcohol Advertising Review Board First Report*, above n 141, 6.

¹⁵² Australian Association of National Advertisers, *AANA Calls for AARB to be Disbanded* (6 July 2012) <<http://www.aana.com.au/news.php/53/aana-calls-for-aarb-to-be-disbanded>>.

¹⁵³ *Ibid.*

¹⁵⁴ *Ibid.*; Australian Association of National Advertisers, *AANA Rejects Claims Made in AARB First Report* (2 August 2012) <<http://www.aana.com.au/news.php/54/aana-rejects-claims-made-in-aarb-first-report>>.

¹⁵⁵ The ABAC Scheme Limited, *ABAC's Response to Announcement re Alcohol Advertising Review Board* (16 March 2012) DSICA

<http://www.dsica.com.au/content/detail/abac_response_to_announcement_of_alcohol_advertising_review_board>.

¹⁵⁶ *Ibid.*

¹⁵⁷ See, e.g., Peter Newell, 'Civil Society, Corporate Accountability and the Politics of Climate Change' (2008) 8(3) *Global Environmental Politics* 122; David Levi-Faur, 'Regulatory Capitalism and the Reassertion of the Public Interest' (2009) 27(3) *Policy and Society* 181; Steve Williams, Edmund Heery and Brian Abbott, 'The Emerging Regime of Civil Regulation in Work and Employment Relations' (2011) 64(7) *Human Relations* 951.

¹⁵⁸ See Cashore, Auld and Newsom, above n 4; Bartley, above n 4.

responsibility strategy the tobacco industry attempted to develop a global voluntary regulatory regime as an alternative to the *Framework Convention on Tobacco Control*.¹⁵⁹

In the case of the AARB, public health advocates sought to reclaim the regulatory space that is currently occupied by the ABAC. The AARB uses complaint determinations to highlight the limitations of industry self-regulation, particularly the fact that the ABAC does not apply to a wide range of techniques that advertisers use to target young people, including placing advertisements on university campuses,¹⁶⁰ and associating alcohol products with youth culture through sponsorship arrangements.¹⁶¹ The AARB ‘names and shames’ companies that undertake irresponsible alcohol advertising, by discussing companies’ response to the Review Board’s determinations in its reports,¹⁶² describing advertisements that target young people on its website, and reporting in the media on companies that refuse to engage with AARB processes.¹⁶³ It challenges the credibility and legitimacy of the ABAC Scheme, building a stronger case for government regulation of alcohol advertising.¹⁶⁴

4. Collaborating with the food industry to strengthen self-regulation

In this chapter, and in Chapter 7, I have demonstrated that there is little formal engagement between the food industry and public health groups in food advertising regulation. The question then is whether the self-regulatory system should provide for greater participation by external stakeholders as a means of improving the transparency and accountability of regulatory processes and strengthening substantive controls on food advertising to children. To answer this question, I asked interview participants whether they thought some form of co-regulatory or collaborative approach to advertising was possible with either the food or alcohol industries.

In relation to food marketing, interviewees’ first choice was statutory restrictions on unhealthy food advertising during children’s peak television viewing times and on the use of

¹⁵⁹ Hadii M Mamudu, Ross Hammond and Stanton A Glantz, 'Project Cerberus: Tobacco Industry Strategy to Create an Alternative to the Framework Convention on Tobacco Control' (2008) 98(9) *American Journal of Public Health* 1630.

¹⁶⁰ Alcohol Advertising Review Board, *Determination Report 6/12 (Jim Beam)* (20 April 2012) <<http://www.alcoholadreview.com.au/articles/determination-reports/>>.

¹⁶¹ Alcohol Advertising Review Board, *Determination Report 31/12 (Smirnoff Vodka)* (31 May 2012) <<http://www.alcoholadreview.com.au/articles/determination-reports/>>.

¹⁶² Alcohol Advertising Review Board, Alcohol Advertising Review Board, *Annual Report 2012-13*, above n 141.

¹⁶³ Sweet and Johnson, 'Naming and Shaming Irresponsible Alcohol Advertisers', above n 138; Alcohol Advertising Review Board, *Alcohol Advertising: Ten Shockers* (2012) <<http://www.alcoholadreview.com.au/key-concerns/alcohol-advertising-ten-shockers>>.

¹⁶⁴ Alcohol Advertising Review Board, *Annual Report 2012-13*, above n 141, ii.

advertising techniques that appealed to children. However, some participants felt that co-regulation was feasible as an interim measure, or as part of a step-wise approach to regulation. Unlike tobacco, food is not a restricted product, nor is it chemically addictive.¹⁶⁵ While the tobacco industry denied the addictiveness and harmful nature of its products,¹⁶⁶ parts of the food industry shows some responsiveness to concerns about the nutritional quality of its products and the legitimacy of its marketing practices.¹⁶⁷ For these reasons, participants thought that there was some scope for working with the food industry. For example, the representative from one health organisation said that:

[t]here are some organisations... that say... you cannot work with [the food] industry under any circumstances, and we actually don't accept that view... because unlike tobacco...there is a safe level of consumption [of food products], and... the food industry itself is not universally evil, unlike the tobacco industry... there is a very solid case for engaging industry to do the right thing, because... some companies are doing some very good things in relation to a whole range of issues in the food space...

Interviewees discussed successful public-private partnerships in other areas of food policy, most importantly the UK's salt reduction initiative (which now forms part of the Responsibility Deal).¹⁶⁸ In 2003, the Food Standards Authority (FSA) and the Department of Health committed to reduce salt intake in the British population from an average of 9.5g to 6g per person per day.¹⁶⁹ To achieve this target, the FSA led work on voluntary product reformulation, undertook consumer awareness campaigns and encouraged the food industry to use interpretive nutrition labelling on its products.¹⁷⁰ Following consultation with NGOs and the food industry, the FSA developed a Food Salt Model that mapped out salt reductions in 80 categories of food products.¹⁷¹ Participating companies then voluntarily reformulated products in order to meet the targets contained in the model. FSA monitoring shows that the salt reduction initiative had a positive effect: by 2008, the intervention had achieved an average of 0.9g per person reduction in daily salt intake, as well as reduced salt levels in key

¹⁶⁵ But see Robert H Lustig, Laura A Schmidt and Claire D Brindis, 'Public Health: The Toxic Truth about Sugar' (2012) 482(7383) *Nature* 27; Michael Moss, 'The Extraordinary Science of Addictive Junk Food', *The New York Times* (online) 20 February 2013 <http://www.nytimes.com/2013/02/24/magazine/the-extraordinary-science-of-junk-food.html?pagewanted=all&_r=0>.

¹⁶⁶ See Carter and Chapman, above n 9.

¹⁶⁷ Yach et al, 'The World Health Organisation's Framework Convention on Tobacco Control: Implications for Global Epidemics of Food-Related Deaths and Disease,' above n 32, 276.

¹⁶⁸ See Public Health Responsibility Deal, *F2. Salt Reduction* (undated) <<https://responsibilitydeal.dh.gov.uk/pledges/pledge/?pl=9>>.

¹⁶⁹ European Commission, *Collated Information on Salt Reduction in the EU* (April 2008) 6

<http://ec.europa.eu/health/archive/ph_determinants/life_style/nutrition/documents/compilation_salt_en.pdf>

¹⁷⁰ *Ibid* 8.

¹⁷¹ *Ibid* 6-7.

food products, including breakfast cereals (a 43 per cent reduction in salt levels), branded, packaged pre-sliced bread (over 30 per cent) and ready to use pasta sauces (over 30 per cent).¹⁷² The interviewee from another public health organisation discussed the possibility of collaboration with the food industry in light of the success of the UK's salt reduction program and the creation of the Responsibility Deal:

Ideally you'd have government-legislated targets... But in the absence of a government willing to do that, we look to the UK model where they have engaged the industry ... to reduce the quantities of [saturated fat, sugar and salt] in the food supply... voluntary agreements in the UK [have]... achieved a tangible reduction in population salt consumption in the space of about three or four years, and the importance of that move is enormous...

Many participants saw product reformulation as a viable area for voluntary or co-regulatory approaches. However, they were more sceptical about the idea of working with the food industry on reducing advertising to children. The strength of the UK salt reduction program was that it involved voluntary action within a framework of government policy and leadership, rather than leaving the industry to set its own agenda – as remains the case with the RCMI and QSRI. Further, interviewees said that there was simply no economic reason for the industry to accept meaningful, voluntary constraints on advertising. Without government involvement in food advertising regulation, or a credible threat of statutory regulation, voluntary schemes were unlikely to be effective in reducing unhealthy food advertising to children. Interviewees also argued that food industry self-regulation forestalled more effective statutory regulation of food marketing. For example, one interviewee said that:

...we are up against a very powerful industry that has put up these voluntary agreements... which have... bought them either time or breathing space or complete government inaction...

Public health interviewees were united behind the idea that there should be strong government leadership in policy on food marketing to children, even if the regulatory scheme incorporated some element of voluntary action. They called for the Federal government to set targets for industry to achieve in reducing marketing to children, create economic incentives for industry to join the scheme, sanction non-compliant companies and threaten the industry with regulation. Participants said that there was enough evidence that the voluntary scheme was not working to justify government action on food advertising to children. Further, the

¹⁷² Ibid 9; Jacqueline L Webster et al, 'Salt Reduction Initiatives Around the World' (2011) 29(6) *Journal of Hypertension* 1043.

report of the National Preventive Health Taskforce created a mandate for government action in this area.¹⁷³ The representative from one health advocacy organisation put this argument in the following terms:

[The Federal government has said] said that [it will] monitor the situation and see how it goes, but... the evidence is fairly clear that... there's been significant breaches and lack of action to enforce these voluntary agreements, so... it's time to take legislative action to...put an end to...marketing to children.

5. Collaboration with the alcohol industry

Public health interviewees were sceptical about the idea of cooperation with the alcohol industry, perhaps more so than with the food industry. Similarly to Big Food, participants said that Big Alcohol had a strong economic incentive to advertise in a way that reached young people and recruited new drinkers. This reflected a broader conflict of interest between the industry's objective of encouraging consumption of its products and the public health goal of minimising harmful alcohol use.¹⁷⁴ Because of this conflict of interest, voluntary approaches were unlikely to reduce young people's exposure to alcohol advertising. For example, one public health representative said that:

The track record suggests that if you do leave it to the industry they won't impose meaningful restrictions... because that would actually harm their bottom line... if you're trusting [the industry] to self-regulate, knowing full well that they have to target this new market, the chances are that that's not going to happen to the extent that it would give any public health gains.

Participants drew comparisons between Big Food, Big Alcohol and Big Tobacco, arguing that all three were 'adopting the same tried and tested methods, which are working for them every single time'.¹⁷⁵ One interviewee argued that like the tobacco industry, the alcohol industry was aware that its advertising appealed to young people and that it deliberately marketed its products to attract young drinkers.¹⁷⁶ In such circumstances, the industry should not be trusted to self-regulate:

... I believe industry does understand what it's doing... it's really clear that [the tobacco industry needs] young people to become brand-conscious as early as possible... is the alcohol industry likely to

¹⁷³ National Preventative Health Taskforce, 'National Preventative Health Strategy – Overview', above n 66, 14-15.

¹⁷⁴ See also the discussion in Chapter 8.

¹⁷⁵ See also Laura Bond, Mike Daube and Tanya Chikritzhs, 'Access to Confidential Alcohol Industry Documents: From "Big Tobacco" to "Big Booze"' (2009) 1(3) *World Healthcare Providers* 54, 58.

¹⁷⁶ See also Gerard Hastings et al, 'Alcohol Advertising: The Last Chance Saloon' (2010) 340(b5650) *British Medical Journal* 184.

know the same thing? I think that's... not an unfair extrapolation, that getting young people drinking early does actually suit them.

As with food industry self-regulation, participants argued that the alcohol industry used its voluntary initiatives to forestall government regulation. Several interviewees discussed the industry's response to criticism of the ABAC Scheme and how it prevented a meaningful government approach to alcohol advertising. A range of state and federal government bodies have scrutinised the ABAC's operation, in addition to the influential review led by the Ministerial Council on Drug Strategy.¹⁷⁷ Most recently, the report of the National Preventive Health Taskforce noted areas of concern in the scheme, including the continued exposure of young people to alcohol advertising on free-to-air television and low levels of public awareness of the ABAC.¹⁷⁸ The alcohol industry presents itself as highly responsive to government criticism and willing to improve self-regulation. However, public health interviewees said that the industry did just enough to avoid further regulation without making significant changes to the scheme. Further, the industry's flexibility made it a 'moving target' that was much harder to regulate. The interviewee from one public health organisation said that:

...the government keeps coming back, finding that [the ABAC has] been ineffective... making some recommendations... some of them get picked up in a really half-hearted way and then they move on to the next review two years later where it says the exact same thing... so you keep getting patchwork [revisions] done on the code, but that patchwork... never really addressed the fact that the code remains... essentially as it was when it was developed 13 years ago.

One public health researcher said that the industry's lack of responsiveness to community and government concerns meant that it should be excluded from regulatory efforts:

¹⁷⁷ See Standing Committee on Family and Community Affairs, Parliament of Australia, *Road to Recovery: Report on Inquiry into Substance Abuse in Australian Communities* (2003) <http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=fca/subabuse/report.htm>; NSW Alcohol Summit, 'Outcomes of the NSW Summit on Alcohol Abuse 2003: Changing the Culture of Alcohol Use in New South Wales' (The Alcohol Summit Coordination Unit, NSW Government, 2003); Drugs and Crime Prevention Committee, Parliament of Victoria, 'Inquiry into Strategies to Reduce Harmful Alcohol Consumption Final Report' (March 2006) vol 1 <http://www.parliament.vic.gov.au/images/stories/committees/dcpc/alcoholharmreduction/DCPC-Report_Alcohol_Vol1_2006-03.pdf>; Standing Committee on Community Affairs, Parliament of Australia, *Alcohol Toll Reduction Bill 2007 [2008]* (June 2008) <http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=s602>.

¹⁷⁸ National Preventive Health Taskforce, 'Australia: The Healthiest Country by 2020. Technical Report 3 Preventing Alcohol Related Harm in Australia: A Window of Opportunity' (Australian Government, 2009) 34-35 <<http://www.preventativehealth.org.au/internet/preventativehealth/publishing.nsf/Content/national-preventative-health-strategy-11p>>.

... if you think back to the Senate Committee hearing on the *Alcohol Toll Reduction Bill*...the NSW Alcohol Summit... all the papers that have been published about this, there have been numerous points at which we have said this is not working. The government has given industry another go to improve and it has not improved. So no, I don't have any faith that we could work with the industry to make [the ABAC Scheme] work.

As in obesity prevention, contemporary approaches to alcohol policy often involve participation by the alcohol industry. Interviewees discussed DrinkWise as an Australian example of a collaborative initiative with the alcohol industry. Although it was created by the alcohol industry, DrinkWise has received federal government funding¹⁷⁹ and its board includes seven community representatives as well as six industry members.¹⁸⁰ However, researchers question its independence from industry and whether its education programs are likely to reduce alcohol-related harm.¹⁸¹ One interviewee said that the creation of DrinkWise hampered genuine alcohol harm reduction efforts. Another argued that the alcohol industry used DrinkWise to influence government's alcohol policy efforts:

... both [political] parties get massive donations from the hospitality and liquor industries, so it's no surprise that the Chair of DrinkWise is on the Australian Preventive Health Agency Advisory Council and the Chair of the Brewer's Association is on that organisation's Expert Committee on Alcohol... the alcohol industry... has insinuated themselves into government health advisory groups, or set up organisations like DrinkWise that purport to put on a responsible face.

The tone of the interview data suggested a more adversarial relationship between public health advocates and the alcohol industry than the food industry. This is illustrated by the creation of the AARB, which directly challenges the ABAC Scheme. Interviewees saw less scope for collaboration and called for strong government leadership in alcohol policy and the exclusion of industry actors from processes of policy development. Interviewees wanted to see the ABAC expanded to cover excluded forms of marketing such as sports sponsorship, as well as administration of the scheme by an independent organisation or a government agency.

6. Is collaboration an effective approach to food advertising regulation?

Evidence of successful public-private partnerships suggests that there is some scope for collaboration between public health and industry actors. However, engagement with industry

¹⁷⁹ DrinkWise Australia, *About* (2012) <<http://www.drinkwise.org.au/about/>>.

¹⁸⁰ Ibid.

¹⁸¹ Wayne D Hall and Robin Room, 'Assessing the Wisdom of Funding DrinkWise' (2006) 185(11/12) *Medical Journal of Australia* 635; Peter Miller and Kypros Kypri, 'Why We Will Not Accept Funding From Drinkwise' (2009) 28(3) *Drug and Alcohol Review* 324.

comes with considerable risks.¹⁸² For example, the tobacco industry used philanthropy to convert NGOs and other organisations into stakeholders that would support companies' policies and practices.¹⁸³ Michele Simon writes that Pepsico's employment of health experts is one example of the company 'co-opting the scientific conversation around public health and diet', and disguises its underlying agenda of 'marketing and selling highly processed food and beverage products to the world'.¹⁸⁴

The ABAC Scheme also illustrates the pitfalls of public health participation in industry initiatives. Because governance processes are predominantly industry based, public health and government representation seems mostly 'symbolic' or tokenistic, and has no real influence over the operation of the scheme or the content of the code.¹⁸⁵ Where industry retains control of governance processes, public health participation is unlikely to result in stronger regulatory standards, improved transparency and accountability or more effective enforcement processes. External participation may benefit the industry, but it can come at considerable expense to the health actors involved, including a loss of independence, public trust and credibility in the eyes of the wider public health community.¹⁸⁶

Another problem with collaborative approaches is that the industry tends to dominate partnership arrangements to the detriment of public health interests. A report on the Responsibility Deal described how NGOs working on the salt reduction pledge experienced considerable pressure from food industry participants to water down the commitments.¹⁸⁷ Consequently, the final pledge simply reiterated the salt reduction targets set by the FSA in 2012. The food industry had already agreed to those targets in 2008, so the Deal effectively made no progress in this area.¹⁸⁸ This supports the public health argument that collaborative approaches are unlikely to lead to effective, evidence-based policy, because of the conflict of interest between public health and the food industry's profit.¹⁸⁹

¹⁸² See Hawkes and Buse, 'Public Health Sector and Food Industry Interaction', above n 22.

¹⁸³ Tesler and Malone, above n 9.

¹⁸⁴ Simon, above n 20, 111.

¹⁸⁵ See also Pettigrew, Johnson and Daube, above n 146, 73.

¹⁸⁶ Kraak et al, above n 31, 504; Jeffrey P Koplan and Kelly D Brownell, 'Response of the Food and Beverage Industry to the Obesity Threat' (2010) 304(13) *Journal of the American Medical Association* 1487.

¹⁸⁷ Hashem, Haigh and Powell, above n 28, 8.

¹⁸⁸ Ibid.

¹⁸⁹ See Gilmore, Savell and Collin, above n 16; Nigel Hawkes, 'BMA Meeting: BMA Condemns Government's "Responsibility Deals" with Food and Drinks Industries' (2011) 342 *British Medical Journal* d4166 <<http://www.bmj.com/content/342/bmj.d4166?rss=1>>.

Public health organisations are uneasy about partnership arrangements with the alcohol industry for similar reasons.¹⁹⁰ Six leading UK health organisations walked out of the Deal's Alcohol Network, which includes representatives from alcohol industry trade associations and companies including Diageo, Heineken and Bacardi Brown-Forman.¹⁹¹ Health sector participants were concerned that the Deal promoted ineffective interventions while ignoring substantive issues like the availability and promotion of alcohol.¹⁹² Their actions prompted two other health organisations participating in the Food Network not to sign up to the Deal.¹⁹³ The Responsibility Deal illustrates how industry can take charge of collaborative arrangements and use them to further its own interests, even in the context of a relatively strong government presence. For these reasons, public health organisations should carefully weigh up the costs and benefits of participating in industry initiatives or endorsing voluntary approaches.

Effective forms of partnership are designed to prevent any one interest from dominating the scheme, and to give all parties a genuine opportunity to participate in collaborative processes.¹⁹⁴ Arguably, public health initiatives should also involve government leadership, monitoring and oversight. For example, government agencies hosted the UK salt reduction initiative, set the objectives to be achieved, designed salt reduction targets and ran a comprehensive monitoring system to track participants' progress in meeting these targets.¹⁹⁵ However, as with the ABAC Scheme, the food industry maintains close control over the regulatory processes attached to the RCMI and QSRI. In these circumstances there is significant capacity for the industry to use public health participants in a way that suits the industry's agenda rather than as a means to strengthen the public's interest in self-regulation.¹⁹⁶ This is particularly the case given that there is a significant imbalance of power

¹⁹⁰ See Daube, above n 13; Hashem, Haigh and Powell, above n 28, 4; Anna B Gilmore and Gary Fooks, 'Global Fund Needs to Address Conflict of Interest' (2012) 90(1) *Bulletin of the World Health Organisation* 71.

¹⁹¹ Hashem, Haigh and Powell, above n 28, 4; Department of Health, *Alcohol Network's Core Group* (undated) <<http://responsibilitydeal.dh.gov.uk/alcohol-networks-core-group/>>.

¹⁹² Gornall, above n 38, 1-2.

¹⁹³ Hashem, Haigh and Powell, above n 28, 4; Sarah Boseley, 'Lansley's Health Strategy Flounders as More Organisations Refuse to Join', *The Guardian* (online) 15 March 2011 <<http://www.guardian.co.uk/politics/2011/mar/15/lansley-health-strategy-flounders-refuse>>.

¹⁹⁴ Bostrom, above n 1, 355; Ansell and Gash, above n 126, 546.

¹⁹⁵ See Webster et al, above n 172, 1046-1047.

¹⁹⁶ Wiist, above n 29.

between the food industry and public health actors, considering the industry's economic and political power.¹⁹⁷

Self-regulation could be re-designed to overcome some of these problems, for example by equally distributing decision-making power between industry and external stakeholders.¹⁹⁸ However, the food industry is unlikely to voluntarily endorse a truly collaborative approach, as it would mean relinquishing control over its self-regulatory system. As with many other voluntary programs, meaningful engagement between industry and public health actors is unlikely to occur spontaneously.¹⁹⁹ Rather, government action will be required to provide impartial leadership, empower external participants and create the institutional supports for effective quasi- or co-regulatory approaches to food advertising regulation.²⁰⁰

7. Conclusion

A collaborative approach is not viable in relation to food advertising regulation. Interviewees said that the alcohol and food industries had not attempted genuine self-regulation, but did only what was necessary to stave off public health criticism and prevent government regulation. Consequently, they were not appropriate partners for collaboration. The ABAC Scheme also points to the risk that external engagement in industry initiatives lends credibility to private regulation without creating more demanding regulatory standards or more transparent and accountable governance processes. It may also dilute the government's policy response and undermine public health advocacy efforts. Public health organisations should be wary of participating in food industry initiatives, including the RCMI and QSRI, as the conditions are not present for the scheme to operate as a successful voluntary or quasi-regulatory program (as demonstrated in Chapters 6 to 9). It may be appropriate for public health stakeholders to collaborate with the alcohol and food industries, but only within a framework of government support and oversight that protects public health interests. Accordingly, the next chapter explores the ways in which food industry self-regulation could be transformed into a co-regulatory system with a more significant role for the state.

¹⁹⁷ Ibid 209-210; Penny Field and Robin Gauld, 'How Do Vested Interests Maintain Outdated Policy? The Case of Food Marketing to New Zealand Children' (2011) 4 *The Open Health Services and Policy Journal* 30, 34.

¹⁹⁸ Bostrom, above n 1, 355.

¹⁹⁹ Parker, above n 2, 225.

²⁰⁰ Ansell and Gash, above n 126.

CHAPTER 11

‘Scaffolding’ self-regulation: government intervention in food industry initiatives

This chapter explores how food industry self-regulation might be improved through government intervention. It draws upon arguments and analysis from previous chapters, as well as data from my interviews with public health representatives, the UK Advertising Standards Authority (ASA) and from document analysis. The chapter begins by describing the challenges governments face when directly regulating public health, using the US Interagency Working Group on Food Marketing to Children as a case study. This sets the scene for considering new forms of public health governance in relation to food marketing. First I explore how the Australian Federal government currently influences food industry self-regulation. I argue that the Federal government should strengthen its involvement in the scheme, while acknowledging that there are significant barriers to the introduction of statutory regulation. The next section of the chapter then considers how food industry self-regulation can be incrementally strengthened through the use of ‘regulatory scaffolds’ that improve the terms and conditions of the RCMI and QSRI and enhance their regulatory processes.¹ Taking a responsive regulatory approach, I argue that government must threaten the food industry with escalating levels of intervention should an expanded scheme fail to reduce children’s exposure to unhealthy food advertising.²

1. Public health regulation in an era of big business and small government

Public health advocates prefer a model of public health law based on ‘command-and-control’ regulation, i.e. prescriptive rules developed, administered and enforced by state bodies.³ As described in Chapter 10, many public health advocates support this approach to regulating food advertising, arguing that governments should introduce legislative measures that

¹ See Roger S Magnusson and Belinda H Reeve, ‘Regulation and the Prevention Agenda’ (2013) 199(2) *Medical Journal of Australia* 89.

² See Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, 1992), and the other references in Chapter 2 above.

³ Robert Baldwin, Colin Scott and Christopher Hood, ‘Introduction’ in Robert Baldwin, Colin Scott and Christopher Hood (eds), *A Reader on Regulation* (Oxford University Press, 1998) 1, 14. See, e.g., Robert Beaglehole et al, ‘Public Health in the New Era: Improving Health through Collective Action’ (2004) 363(9426) *The Lancet* 2084; Tim Lang, ‘Food, the Law and Public Health: Three Models of the Relationship’ (2006) 120 *Public Health* 30; Lawrence Gostin, *Public Health Law: Power, Duty, Restraint* Lawrence Gostin, *Public Health Law: Power, Duty, Restraint* (University of California Press, 3rd ed, 2012).

eliminate scope for industry manipulation and mandate compliance.⁴ They claim that legislative bans are more effective than voluntary schemes, have wide community support and respect children's right to health.⁵ Government leadership is also appropriate given the state's duty to protect the welfare of its population and its necessary role in addressing the social determinants of health.⁶ Further, there is little reason to allow the food industry to self-regulate, given evidence that voluntary initiatives contain lenient standards, establish inadequate administrative and enforcement arrangements and make few improvements to the food marketing environment in practice.⁷

However, there are significant political constraints on the capacity of government to impose direct statutory controls for food advertising. First, industry has already claimed the regulatory space by creating, administering and enforcing systems of governance.⁸ Second, government action is constrained by growing demands for interventions to be evidence-based.⁹ Arguments for restrictions on food advertising derive from studies suggesting a causal link between exposure to unhealthy food advertising and diet-related health, implying that advertising regulation would be an effective obesity prevention measure.¹⁰ However, industry (and some government) actors question whether the evidence base is sufficient to warrant statutory forms of action.¹¹ Like Big Tobacco, the food industry denies that

⁴ See, e.g., J Lumley, J Martin and N Antonopoulos, 'Exposing the Charade - The Failure to Protect Children from Unhealthy Food Advertising' (Obesity Policy Coalition, 2012)

<<http://www.opc.org.au/paper.aspx?ID=exposing-the-charade&Type=policydocuments>>; David Stuckler and Marion Nestle, 'Big Food, Big Systems and Global Health' (2012) 9(6) *PLoS Medicine* e1001242 <<http://www.plosmedicine.org/article/info%3Adoi%2F10.1371%2Fjournal.pmed.1001242>>.

⁵ See Chapter 1 for a fuller version of these arguments.

⁶ Chapter 3 sets out justifications for government intervention in public health.

⁷ These points are comprehensively discussed in Chapters 6 to 9.

⁸ See, e.g., Julia Black, 'Decentring Regulation: Understanding the Role of Regulation and Self-Regulation in a "Post-Regulatory" World' (2001) 54(1) *Current Legal Problems* 103, 128; Tim Bartley, 'Institutional Emergence in an Era of Globalisation: The Rise of Transnational Private Regulation of Labour and Environmental Conditions' (2007) 113(2) *American Journal of Sociology* 297; John Braithwaite, *Regulatory Capitalism: How It Works, Ideas for Making It Work Better* (2008). See also Chapter 3's description of the rise of regulatory capitalism and the changing role of the state.

⁹ Don Nutbeam, 'How Does Evidence Influence Public Health Policy? Tackling Health Inequalities in England' (2003) 14(3) *Health Promotion Journal of Australia* 154; Ross C Brownson, Jonathan E Fielding and Christopher M Maylahn, 'Evidence-Based Public Health: A Fundamental Concept for Public Health Practice' (2009) 30 *Annual Review of Public Health* 175. See also Gostin, above n 3, 63 (and Chapter 3 above).

¹⁰ See Rogan Kersch and James Morone, 'The Politics of Obesity: Seven Steps to Government Action' (2002) 21(6) *Health Affairs* 142, 14; Corinna Hawkes, 'Regulating Food Marketing to Young People Worldwide: Trends and Policy Drivers' (2007) 97(11) *American Journal of Public Health* 1962. See also the discussion in Chapter 4 about how different actors in food advertising regulation use evidence on the effects of self-regulation to support or challenge government intervention in this area.

¹¹ See, e.g., Martin Caraher, Jane Landon and Kath Dalmey, 'Television Advertising and Children: Lessons From Policy Development' (2006) 9(5) *Public Health Nutrition* 596, 602; Alexandra Chung et al, 'An Analysis of Potential Barriers and Enablers to Regulating the Television Marketing of Unhealthy Foods to Children at the State Government Level in Australia' (2012) 12(1) *BMC Public Health* 1123, 1126.

advertising influences product choice, meaning that legislation would constitute an over-reaction to the health risks posed by food marketing.¹² This is despite an increasingly large body of research that suggests a plausible connection between unhealthy food advertising and obesity, independent of other contributing factors.¹³

In the United States, Constitutional protection of commercial free speech imposes additional obstacles to government regulation of food advertising.¹⁴ Legal systems permit limitations on commercial speech in order to prevent threats to public health and to protect children from harm.¹⁵ However, First Amendment jurisprudence requires regulation to be designed to restrict child-targeted advertising while not unduly restricting promotions to adults.¹⁶ For example, the US Supreme Court struck down a Massachusetts regulation that banned tobacco advertising within 1000 feet of schools and playgrounds,¹⁷ on the basis that ‘the governmental interest in protecting children from harmful materials... does not justify an unnecessarily broad suppression of speech addressed to adults’.¹⁸ Thus, restrictions on advertisements that are seen by both children and adults may be vulnerable to legal challenge where they significantly limit the ability of advertisers to communicate with adult audiences.¹⁹ Although the Australian constitution does not explicitly protect commercial free speech, below I discuss how neo-liberal policy approaches effectively prevent the Federal government from taking decisive action to reduce children’s exposure to food marketing.

The food industry will attack any attempt by government to influence its marketing, either by legislation or by less intrusive measures.²⁰ For example, in 2009 the US Congress directed the Federal government to convene an Interagency Working Group on Marketing to Children, with representatives from the US Federal Trade Commission, the Department of Agriculture,

¹² Australian Food and Grocery Council, *Marketing to Children - Need to Restate the Facts* (12 November 2012) <<http://www.afgc.org.au/media-releases/1311-marketing-to-children-need-to-rewrite-the-facts.html>>.

¹³ See Chapter 1 for a description of this evidence.

¹⁴ See Michelle M Mello, 'Federal Trade Commission Regulation of Food Advertising to Children: Possibilities for a Reinvigorated Role' (2010) 35(2) *Journal of Health Politics, Policy and Law* 227, 264; Jennifer Pomeranz, 'Television Food Marketing to Children Revisited: The Federal Trade Commission Has the Constitutional and Statutory Authority to Regulate' (2010) 38(1) *Journal of Law, Medicine and Ethics* 98.

¹⁵ Ronald Bayer and Amy L Fairchild, 'The Genesis of Public Health Ethics' (2004) 18(6) *Bioethics* 473, 486, 489.

¹⁶ Mello, above n 14, 256.

¹⁷ *Lorillard v Reilly* 533 US 525 (2001).

¹⁸ *Reno v American Civil Liberties Union* 521 US 844 (1997) 875 cited in *Lorillard v Reilly* 533 US 525 (2001) 564.

¹⁹ Mello, above n 14, 256-257.

²⁰ *Ibid.* See also Marion Nestle, *Food Politics: How the Food Industry Influences Nutrition and Health* (University of California Press, 2002); Michele Simon, 'Can Food Companies Be Trusted to Self-Regulate? An Analysis of Corporate Lobbying and Deception to Undermine Children’s Health' (2006) 39 *Loyola of Los Angeles Law Review* 169.

the Centres for Disease Control and the Food and Drug Administration.²¹ This group sought to develop uniform standards for the nutritional quality of foods promoted to children, following concerns that the US *Children's Food and Beverage Advertising Initiative* (CFBAI) allowed participants to use their own complex and weak criteria.²² In 2011 the Working Group released draft principles that limited the amount of sodium, sugar and fat in foods advertised to children, as well as setting a minimum content for healthier food groups such as fruits, vegetables and low-fat milk products.²³ The Working Group stressed the non-legislative nature of the standards, which the industry would apply in existing self-regulatory initiatives.²⁴ It called on the industry to adopt the standards voluntarily by 2016.²⁵

In October 2011, following public consultation, two House of Congress Energy and Commerce subcommittees jointly convened a hearing to consider submissions on the proposal.²⁶ Members of the food industry and the Republican Party argued that the standards were overly broad, ineffective, 'quasi-regulatory' and encroached on First Amendment rights.²⁷ Major food companies also banded together under the 'Sensible Food Policy Coalition' to lobby against the nutritional standards – to the value of US\$6.6 million in the

²¹ Vivica I Kraak et al, 'Industry Progress to Market a Healthful Diet to American Children and Adolescents' (2011) 41(3) *American Journal of Preventive Medicine* 322, 328.

²² Dale Kunkel, Christopher McKinley and Paul Wright, 'The Impact of Industry Self-Regulation on the Nutritional Quality of Foods Advertised on Television to Children' (Children Now, December 2009) <http://www.childrennow.org/index.php/learn/reports_and_research/article/576>; Parke Wilde, 'Self-Regulation and the Response to Concerns about Food and Beverage Marketing to Children in the United States' (2009) 67(3) *Nutrition Reviews* 155, 163; Interagency Working Group on Food Marketing to Children, 'Food for Thought' (Federal Trade Commission, 28 April 2011) <<http://www.ftc.gov/opa/2011/04/foodmarket.shtm>>.

²³ Interagency Working Group on Food Marketed to Children, 'Preliminary Proposed Nutrition Principles to Guide Industry Self-Regulatory Efforts' (Federal Trade Commission, 28 April 2011) <<http://www.ftc.gov/opa/2011/04/foodmarket.shtm>>.

²⁴ Ibid. See also David Vladeck, 'What's on the Table' on Bureau of Consumer Protection, Federal Trade Commission, *Business Centre Blog* (1 July 2011) <<http://business.ftc.gov/blog/2011/07/whats-table>>.

²⁵ Interagency Working Group on Food Marketed to Children, 'Preliminary Proposed Nutrition Principles', above n 23, 30.

²⁶ Doug Trapp, 'Proposed Standards Scaled Back for Food Marketing Aimed at Children', *American Medical News* (online) 24 October 2011 <<http://www.amednews.com/article/20111024/government/310249952/7/#relatedcontenthed>>.

²⁷ See Marion Nestle, 'The Food Industry vs. Nutrition Standards: A First Amendment Issue?' on Marion Nestle, *Food Politics* (6 September 2011) <<http://www.foodpolitics.com/2011/09/the-food-industry-vs-nutrition-standards-a-first-amendment-issue/>> *Food Marketing: Can 'Voluntary' Government Restrictions Improve Children's Health?* Hearing before the Subcommittee on Commerce Manufacturing and Trade and Subcommittee on Health of the House Energy and Commerce Committee (12 October 2011) (opening statement of Fred Upton, Energy and Commerce Committee Chairman) <<http://archives.republicans.energycommerce.house.gov/hearings/hearingdetail.aspx?NewsID=8973>>; *Food Marketing: Can 'Voluntary' Government Restrictions Improve Children's Health?* Hearing before the Subcommittee on Commerce Manufacturing and Trade and Subcommittee on Health of the House Energy and Commerce Committee (12 October 2011) (statement of Jim Baughman, Senior Marketing Counsel, Campbell Soup Company) <<http://archives.republicans.energycommerce.house.gov/hearings/hearingdetail.aspx?NewsID=8973>>.

first quarter of 2011.²⁸ Consequently, the Working Group significantly weakened its original proposal, revising the coverage of its advertising standards from children 16 years of age and under, to those aged less than 12 years. It also excluded marketing through philanthropy, sponsorship, entertainment and sports events, brand equity characters and product packaging, all of which were included in the standard's original definition of marketing.²⁹

Congress further delayed the guidelines by inserting a clause into the *Consolidated Appropriations Act 2012* that required the Working Group to perform a cost/benefit analysis of its final recommendations,³⁰ a measure typically applied only to mandatory regulations.³¹ In response to the Working Group's activities, the CFBAI introduced a uniform nutrient profiling scheme that takes effect in December 2013.³² Although more demanding than existing company-specific schemes, these standards restrict fewer products in advertising to children than those of the Working Group.³³

The failure of the Interagency Working Group demonstrates the power of food industry lobbying and its influence over the US Federal Government.³⁴ It also illustrates the complex relationships between public and private actors in food governance, where governments are

²⁸ Lyndsey Layton and Dan Eggen, 'Industries Lobby Against Voluntary Nutrition Guidelines for Food Marketed to Kids', *The Washington Post* (online) 9 July 2011 <http://articles.washingtonpost.com/2011-07-09/politics/35267908_1_voluntary-nutrition-guidelines-junk-food-foodmakers>, cited in Michele Simon 'PepsiCo and Public Health: Is the Nation's Largest Food Company a Model of Corporate Responsibility or Master of Public Relations?' (2011) 15 *CUNY Law Review* 101, 116.

²⁹ Trapp, above n 26; *Food Marketing: Can 'Voluntary' Government Restrictions Improve Children's Health?* Hearing before the Subcommittee on Commerce Manufacturing and Trade and Subcommittee on Health of the House Energy and Commerce Committee (12 October 2011) (statement of David C Vladeck, Director of the Bureau of Consumer Protection, Federal Trade Commission) <<http://archives.republicans.energycommerce.house.gov/hearings/hearingdetail.aspx?NewsID=8973>>; Marlene B Schwartz and Amy Ustjanauskas, 'Food Marketing to Youth: Current Threats and Opportunities' (2012) 8(2) *Childhood Obesity* 85.

³⁰ Marion Nestle, 'Congress Delays Setting Nutrition Standards for Kids - Again', *The Atlantic* (online) 19 December 2011 <<http://www.theatlantic.com/health/archive/2011/12/congress-delays-setting-nutrition-standards-for-kids-again/250144/>>. See *Consolidated Appropriations Act* 112 PL 74 § 626 (2012); *Improving Regulation and Regulatory Review*, 76 Fed Reg 13563 (21 January 2011).

³¹ Michele Simon, 'Congress to Kids: Drop Dead' on Michele Simon, *Eat Drink Politics* (17 December 2011) <<http://www.appetiteforprofit.com/2011/12/17/congress-to-kids-drop-dead/>>; Food Marketing Workgroup, *Take Action* (2012) <<http://www.foodmarketing.org/take-action/>>. At the time of writing the Interagency Working Group had not released its final draft standards.

³² Elaine D Kolish, 'The Children's Food and Beverage Advertising Initiative White paper on CFBAI's Uniform Nutrition Criteria' (Children's Food and Beverage Advertising Initiative, Council of Better Business Bureaus, July 2011) <<http://www.bbb.org/us/childrens-food-and-beverage-advertising-initiative/info/>>; Elaine D Kolish and Magdalena Hernandez, 'The Children's Food and Beverage Advertising Initiative: A Report on Compliance and Progress During 2011' (Better Business Bureau, December 2012) ii <<http://www.bbb.org/us/childrens-food-and-beverage-advertising-initiative/info/>>.

³³ H Brinsden and T Lobstein, 'Comparison of Nutrient Profiling Schemes for Restricting the Marketing of Food and Drink to Children' (2013) Early Online *Paediatric Obesity* <<http://onlinelibrary.wiley.com/doi/10.1111/j.2047-6310.2013.00167.x/full>>.

³⁴ Marion Nestle, 'Congress Delays Setting Nutrition Standards for Kids - Again', above n 30.

attempting to regulate a powerful global industry that increasingly creates its own de facto regulatory standards rather than simply complying with those that have been promulgated by the state.³⁵ At the same time, governments often invite the industry to be an active participant in obesity prevention initiatives, by contributing to the formulation of national nutrition policy, affiliating with government initiatives and participating in private-public partnerships.³⁶ As a result, many countries have found it difficult to directly regulate food advertising to children, defaulting to industry self-regulation.³⁷ However, governments and health agencies continue to show interest in new ways of shaping, steering or influencing food industry action, as an intermediate measure between legislation and ‘pure’ self-regulation.³⁸ Key to many proposals is step-wise or incremental action, incorporating transition periods, phased restrictions and the threat of more coercive regulatory measures, all of which bears a close resemblance to responsive regulation.³⁹ This chapter explores the potential for a similar incremental strengthening of the RCMI and QSRI by first examining existing government influence over the scheme.

2. Australian Federal government influence in food industry self-regulation

Chapter 2 outlined the broader regulatory framework that the RCMI and QSRI operate in, including co-regulatory arrangements under the *Broadcasting Services Act 1992* (Cth) and

³⁵ Doris Fuchs, Agni Kalfagianni and Tetty Havinga, 'Actors in Private Food Governance: The Legitimacy of Retail Standards and Multistakeholder Initiatives with Civil Society Participation' (2011) 28(3) *Agriculture and Human Values* 353, 354. See also Lang, 'Food, the Law and Public Health,' above n 3, 31-32; Tetty Havinga, 'Private Regulation of Food Safety by Supermarkets' (2006) 28(4) *Law and Policy* 514; Tim Lang, David Barling and Martin Caraher, *Food Policy: Integrating Health, Environment and Society* (Oxford University Press, 2009) 75-94.

³⁶ David S Ludwig and Marion Nestle, 'Can the Food Industry Play a Constructive Role in the Obesity Epidemic?' (2008) 300(15) *Journal of the American Medical Association* 1808, 1809. See also Marion Nestle, *Food Politics*, above n 20.

³⁷ Hawkes, 'Regulating Food Marketing to Young People Worldwide', above n 10; Corinna Hawkes, 'Marketing Food to Children: Changes in the Global Regulatory Environment, 2004-2006' (World Health Organisation, 2007) <http://www.who.int/dietphysicalactivity/publications/regulatory_environment_2007/en/>; C Hawkes and T Lobstein, 'Regulating the Commercial Promotion of Food to Children: A Survey of Actions Worldwide' (2011) 6(2) *International Journal of Paediatric Obesity* 83, 89.

³⁸ Hawkes, 'Marketing Food to Children: Changes in the Global Regulatory Environment', above n 37, 10; Hawkes and Lobstein, above n 37, 89.

³⁹ Ibid. See also the discussion of the Interagency Working Group above; Michael J McGinnis, Jennifer Appleton Gootman and Vivica I Kraak, *Food Marketing to Children and Youth: Threat or Opportunity?* (The National Academies Press, 2005); National Preventative Health Taskforce, 'Australia: The Healthiest Country by 2020. National Preventative Health Strategy - Overview' (Australian Government, 2009) <<http://www.preventativehealth.org.au/internet/preventativehealth/publishing.nsf/Content/national-preventative-health-strategy-11p>>; Jane E Henney, Christine L Taylor and Caitlin S Boon, *Strategies to Reduce Sodium Intake in the United States* (The National Academies Press, 2010) ch 9; World Health Organisation, 'Set of Recommendations on the Marketing of Foods and Non-Alcoholic Beverages to Children' (2010) <<http://www.who.int/dietphysicalactivity/publications/recsmarketing/en/>>; Neal Blewett et al, 'Labelling Logic: Review of Food Labelling Law and Policy' (Commonwealth of Australia, 2011) <<http://www.foodlabellingreview.gov.au/internet/foodlabelling/publishing.nsf/content/labelling-logic>>.

the self-regulatory system created by the advertising industry. It also discussed how the terms of the two codes explicitly link them to the broader advertising regulatory system. For example, the RCMI and QSRI require that companies comply with the *Children's Television Standards* (CTS) 2009 that relate to the use of popular personalities and characters, and premium offers in advertising to children.⁴⁰ The codes also specify that companies must abide by the advertising industry's codes of conduct, namely the *Code of Ethics*, the *Food and Beverages Advertising and Marketing Communications Code*, and the *Code for Advertising and Marketing Communications to Children*.⁴¹

Chapter 2 described inadequate monitoring and enforcement of the CTS 2009 (and other advertising regulatory instruments), permitting advertisers to breach the standards with little fear of being sanctioned.⁴² Combined with the limited scope of the CTS 2009, this lack of enforcement means that the legislative underpinning to the RCMI and QSRI do not support the objective of reducing children's exposure to unhealthy food advertising. Thus, a critical first step to improving the self-regulatory scheme is strengthening existing statutory controls on advertising to children by providing for more effective enforcement of the CTS 2009.

As well as providing the regulatory framework for the codes' operation, a series of government reviews encouraged the food industry to self-regulate. Chapter 1 described the main impetus for the RCMI, namely the review of the CTS 2005 by the Australian Communications and Media Authority (ACMA),⁴³ as well as the 2009 report on obesity prevention by the House of Representatives Standing Committee on Health and Aging.⁴⁴ In the same year, the National Preventive Health Taskforce released its strategy for chronic

⁴⁰ Australian Food and Grocery Council, *The Responsible Children's Marketing Initiative of the Australian Food and Beverage Industry* (March 2011) 1 <<http://afgc.org.au/industry-codes/advertising-to-children/rcmi.html>>; Australian Quick Service Restaurant Industry, *Initiative for Responsible Advertising and Marketing to Children* (June 2009) 1 Australian Association of National Advertisers <<http://www.aana.com.au/QuickServiceRestaurantInitiative.htm>>.

⁴¹ Ibid.

⁴² Michele Roberts et al, 'Compliance with Children's Television Food Advertising Regulations in Australia' (2012) 12(1) *BMC Public Health* 846.

⁴³ See Chapters 1 and 7 for further description of how the RCMI and QSRI were developed. The QSRI followed from the creation of the RCMI and is not explicitly linked to the ACMA's review in the same way as the RCMI. See also Australian Communications and Media Authority, 'Review of the Children's Television Standards 2005: Final Report of the Review' (Australian Government, August 2009) <<http://www.acma.gov.au/Industry/Broadcast/Television/Childrens-TV/childrens-television-standards-review>>.

⁴⁴ House of Representatives Standing Committee on Health and Ageing, Parliament of Australia *Weighing It Up: Obesity in Australia* (2009) <http://www.aph.gov.au/parliamentary_business/committees/house_of_representatives_committees?url=haa/./obesity/report.htm>.

disease prevention, which critiqued the operation of the RCMI. The Taskforce recommended that the Federal government monitor the code, and incrementally strengthen the regulatory scheme if it failed to reduce children's exposure to unhealthy food advertising.⁴⁵ However, the response from government provided tacit support for food industry self-regulation, and little suggestion that it would restrict unhealthy food advertising through legislative measures.⁴⁶ Rather, the government agreed to monitor the effectiveness of self-regulation in reducing children's exposure to unhealthy food advertising, via the Australian National Preventive Health Agency (ANPHA) (described in Chapter 4).⁴⁷

Prior to ANPHA's establishment, the ACMA evaluated the RCMI and QSRI and released a report on their operation, which I described in Chapter 4.⁴⁸ To summarise, the report highlighted significant limitations in the self-regulatory regime, including the narrow terms of the two codes and a lack of publicly available information on their operation.⁴⁹ The ACMA concluded that self-regulation had not fully addressed community concerns about food advertising and that it was unclear whether it had reduced children's exposure to unhealthy food advertising on free-to-air television.⁵⁰ However, it decided not to conduct further monitoring of the initiatives. As a broadcasting regulator, the ACMA said it was 'neither equipped nor resourced to make independent judgments on issues of public and preventive health'.⁵¹ It acknowledged the creation of ANPHA which, as a public health agency, was better placed to promote a whole-of-government response to obesity prevention and to take the lead in monitoring and evaluating the initiatives.⁵²

At an August 2011 Australian Health Ministers' Conference, the South Australian Minister for Health raised evidence that the RCMI and QSRI were unsuccessful in reducing children's

⁴⁵ National Preventative Health Taskforce, 'National Preventative Health Strategy - The Roadmap for Action' (Commonwealth of Australia, 2009) 125

<<http://www.preventativehealth.org.au/internet/preventativehealth/publishing.nsf/Content/national-preventative-health-strategy-11p>>.

⁴⁶ Australian Government, 'Taking Preventative Action: A Response to Australia: The Healthiest Country by 2020, The Report of the National Preventative Health Taskforce' (Commonwealth of Australia, 2010) 46 <<http://www.preventativehealth.org.au/>>.

⁴⁷ Ibid.

⁴⁸ See Australian Communications and Media Authority, 'Industry Self-Regulation of Food and Beverage Advertising to Children. ACMA Monitoring Report' (Australian Government, December 2011) <http://www.acma.gov.au/webwr/_assets/main/lib310132/industry_self-regulation-advertising_to_children_monitoring_report-dec2011.pdf>.

⁴⁹ Ibid 15-21, 28-32.

⁵⁰ Ibid 6.

⁵¹ Ibid.

⁵² Ibid 37.

exposure to unhealthy food advertising.⁵³ Following a discussion of this evidence, Australian Health Ministers agreed on the following actions:⁵⁴

- The Australian Health Ministers' Advisory Council would work with ANPHA and the South Australian Government to organise a national seminar on food marketing to children;
- ANPHA would review recent monitoring of food advertising, related evidence and relevant reports, and report back in 2012; and
- The Food Regulation Standing Committee would provide advice by early 2012 on developing suitable criteria for determining unhealthy foods that are not appropriate for advertising to children.

In May 2012, South Australia Health, ANPHA and the Australian Health Ministers Advisory Council held a seminar to discuss action on food advertising to children.⁵⁵ Attended by government, industry and public health representatives, the seminar identified reducing children's exposure to food marketing as a key policy goal, along with creating a clear mechanism for evaluating whether this objective has been achieved.⁵⁶ Despite industry claims that self-regulation was reducing food advertising to children, governments and public health participants remained concerned about children's exposure to advertising during key television viewing periods, as well as in other media falling outside the codes.⁵⁷ However, the seminar focused on 'strengthening current industry initiatives in the short to medium term through further discussion and engagement'.⁵⁸ This was to be facilitated by the establishment of a government-industry working group, the National Working Group on Food Marketing to Children, which included representatives of the AFGC, ANPHA and South Australia Health. The Working Group's key activities would be to:⁵⁹

- Measure and reduce children's exposure to unhealthy food marketing;

⁵³ Department of Health and Ageing, *Weighing It Up: Obesity in Australia* (5 May 2013) Australian Government <<http://health.gov.au/internet/publications/publishing.nsf/Content/weighing-it-up~recommend11>>.

⁵⁴ Ibid; Australian National Preventive Health Agency, *Draft Frameworks for Monitoring Television Marketing and Advertising to Children for Unhealthy Food and Drinks – Issues Paper* (April 2013) 4-5 <<http://anpha.gov.au/internet/anpha/publishing.nsf/Content/frameworks-monitoring-unhealthy-food-drafts>>.

⁵⁵ Australian National Preventive Health Agency, *Communiqué, National Seminar on Food Advertising and Marketing to Children* (24 May 2012) ANPHA, SA Health <<http://anpha.gov.au/internet/anpha/publishing.nsf/Content/news-20120524>>.

⁵⁶ Ibid 2.

⁵⁷ Ibid 3.

⁵⁸ Ibid.

⁵⁹ Ibid 4.

- Develop a framework to facilitate regular, independent monitoring of unhealthy food marketing directed to children in a standardised format, including agreed mechanisms and metrics for analysing and reporting on advertising data;
- Provide input and advice to reviews of the food and advertising industry codes undertaken by relevant industry bodies;
- Consider the development of standardised nutritional criteria for identifying products that are appropriate for advertising to children; and
- Consider whether marketing activities in children's sport are consistent with the intent of the RCMI and QSRI.

Despite the concerns raised at the seminar, the food industry did not indicate that it would strengthen its voluntary codes.⁶⁰ However, ANPHA commissioned the Commonwealth Scientific and Industrial Research Organisation (CSIRO) to review recent research on children's exposure to food and beverage marketing on television.⁶¹ In October 2012, ANPHA released a report evaluating children's exposure to unhealthy food advertising since the introduction of the RCMI and QSRI.⁶² Chapter 4 described the findings of this report, which found that there was little food advertised during C and P classified programs, but that the amount of unhealthy food advertising was high during G rated programs with large child audiences.⁶³ Further, changes in patterns of food advertising could not be attributed to the creation of the initiatives because a consistent method had not been applied across the studies.⁶⁴

In April 2013 ANPHA released two draft frameworks to facilitate independent monitoring of children's exposure to unhealthy food marketing.⁶⁵ The frameworks set out criteria for sampling periods; the definition of children; data sources; television programs to be examined; classification of unhealthy products; and indicators for analysis.⁶⁶ One framework concerns children's exposure to television advertising of unhealthy food during C, P and G-

⁶⁰ Department of Health and Ageing, *Weighing It Up: Obesity in Australia*, above n 53.

⁶¹ Ibid.

⁶² Lisa G Smithers, John W Lynch and Tracy Merlin, 'Television Marketing of Unhealthy Food and Beverages to Children in Australia: A Review of Published Evidence from 2009' (Australian National Preventive Health Agency, 2012) <<http://www.anpha.gov.au/internet/anpha/publishing.nsf/Content/publications>>.

⁶³ Ibid 156.

⁶⁴ Ibid 37. See also Australian National Preventive Health Agency, *Overweight and Obesity Prevention* (2 May 2013) <<http://anpha.gov.au/internet/anpha/publishing.nsf/Content/obesity-home>>.

⁶⁵ Australian National Preventive Health Agency, *Draft Frameworks for Monitoring Television Marketing and Advertising to Children of Unhealthy Food and Drinks* (13 May 2013)

<<http://anpha.gov.au/internet/anpha/publishing.nsf/Content/draft-frameworks-tv-marketing-children>>.

⁶⁶ Ibid.

rated programs and during programs with a significant child viewing audience.⁶⁷ The second monitors compliance with the initiatives by measuring the number and frequency of unhealthy food advertisements in media directed primarily to children (according to the terms of the codes) and the proportion of this advertising by signatory companies.⁶⁸ ANPHA intends to review the frameworks after two years in operation.⁶⁹ At the time of writing, ANPHA had released an issues paper and was seeking public comment on the frameworks' operation.⁷⁰ ANPHA expects to release the two frameworks as a voluntary guideline for parties interested in researching and monitoring the amount of, and children's exposure to, television advertising for unhealthy food, as well as food industry compliance with self-regulation.⁷¹ This is in accordance with ANPHA's powers to 'develop national standards and codes of practice relating to preventive health matters' under the *Australian National Preventive Health Agency Act 2010* (Cth).⁷²

ANPHA had also requested advice from the Food Regulatory Standing Committee on developing nutrition criteria to support self-regulation of food advertising. However, the Standing Committee's advice was delayed by its work on a front-of-pack labelling scheme and the standard for nutrition and health claims.⁷³ The Committee was to provide advice to ANPHA at a June 2013 meeting of the Legislative and Government Forum on Food Regulation.⁷⁴ However, it appears that the Forum did not consider the criteria at the meeting, although it may recommend the use of the Nutrient Profiling Scoring Criterion recently developed for the health and nutrition claims standard.⁷⁵

It is too early to say whether ANPHA's monitoring frameworks will significantly strengthen food industry self-regulation. However, the frameworks contain significant limitations that

⁶⁷ Defined as time periods where the number of children watching television across all time periods is greater than 35 per cent of the maximum child audience for the day. See Australian National Preventive Health Agency, *Framework 1* (10 May 2013) <<http://anpha.gov.au/internet/anpha/publishing.nsf/Content/framework-1>>.

⁶⁸ Australian National Preventive Health Agency, *Framework 2* (10 May 2013) <<http://anpha.gov.au/internet/anpha/publishing.nsf/Content/framework-2>>.

⁶⁹ Australian National Preventive Health Agency, Draft Frameworks for Monitoring Television Marketing and Advertising to Children, above n 65.

⁷⁰ Ibid.

⁷¹ Ibid. At the time of writing, ANPHA had not specified a release date for the frameworks.

⁷² See Australian National Preventive Health Agency Act 2010 (Cth) s 11(1)(i). See also Department of Health and Ageing, *Weighing It Up: Obesity in Australia*, above n 53.

⁷³ See Chapter 2 for a discussion of the health and nutrition claims standard (*Australia New Zealand Food Standards Code* (at 11 July 2013) std 1.2.7).

⁷⁴ Department of Health and Ageing, *Weighing It Up: Obesity in Australia*, above n 53.

⁷⁵ Legislative and Governance Forum on Food Regulation, *Legislative and Governance Forum Final Communiqué* (14 June 2013) <<http://www.health.gov.au/internet/main/publishing.nsf/Content/RPGD-RRF-foodsecretariat-Final-Communique-14-06-13>>. See Chapter 2 for a discussion of the Nutrient Profiling Scoring Criterion.

could undermine their usefulness. For example, they define children narrowly as under age 12 or 14 (depending on whether the RCMI or QSRI is being evaluated) and apply only to television advertising.⁷⁶ One of proposed indicators in Framework 1 is the *proportion* of total food advertisements that are for unhealthy products in programs with large child audiences.⁷⁷ This is not a meaningful indicator for describing children's exposure to advertising and may be misleading where programs contain only a few advertisements for food products.⁷⁸

The two frameworks have different objectives, data and definitions, with one monitoring children's exposure to unhealthy food advertising and the other monitoring companies' compliance with their own commitments under the codes. Accordingly, the results from studies using one framework cannot be compared to results from the other.⁷⁹ Studies using Framework 2 might conclude that the industry is complying with the codes, but this does not necessarily mean that children's exposure to unhealthy food advertising has diminished.⁸⁰ While it is important to evaluate industry compliance with voluntary codes, it must be kept in mind that a high level of compliance with weak self-regulation will not produce significant changes in the marketing environment. Thus, any results of studies using Framework 2 would need to be considered in light of those from studies using Framework 1.

3. Strengthening government intervention in the RCMI and QSRI

Despite these concerns, the ANPHA frameworks represent growing government interest in food industry self-regulation and in incrementally strengthening state oversight of the scheme. The question is whether there is now sufficient government involvement in self-regulation to ensure that it reduces children's exposure to unhealthy food advertising. As they stand, the codes cannot reasonably achieve this goal. This thesis has described numerous weaknesses and loopholes in their terms and conditions, combined with administration and enforcement that is ineffective and lacks transparency and accountability. There are also few economic or other incentives for the industry to adopt more demanding standards. Further, evidence indicates that the codes have not significantly reduced children's exposure to unhealthy food advertising and they have failed to address community concerns about advertising and childhood obesity.

⁷⁶ Lesley King et al, Submission to Australian National Preventive Health Agency, Draft Frameworks for Monitoring Television Marketing and Advertising to Children of Unhealthy Food and Drinks (5 June 2013) 2.

⁷⁷ Australian National Preventive Health Agency, *Framework 1*, above n 67.

⁷⁸ King et al, above n 76, 2.

⁷⁹ *Ibid* 1.

⁸⁰ *Ibid*.

At present, Federal government intervention consists of developing standards for monitoring of food advertising by other parties. It does not appear that ANPHA will monitor the RCMI and QSRI directly, nor has the government sought to improve the terms and conditions of self-regulation. Government bodies encouraged the creation of the codes and used them as a justification for not directly regulating food advertising. However, the food industry did not consult with government in developing the code nor does it involve public actors in self-regulatory processes.⁸¹ Although independent monitoring is a step in the right direction, the many failures of self-regulation mean that further government intervention is likely to be necessary if these initiatives are to contribute to obesity prevention. The ABAC Scheme also illustrates the need for a comprehensive system of government monitoring, intervention and oversight, as limited government engagement risks industry co-option of the public interest in voluntary codes.

Barriers to legislative restrictions on food advertising to children

This argument does not imply that statutory regulation is the solution to reducing children's exposure to food advertising. There are a number of barriers to government regulation, meaning that command-and-control options may not be practical or politically feasible, at least not immediately. Chapter 8 described how the food industry is Australia's largest manufacturing sector and a significant employer in rural and regional areas of Australia.⁸² The government relies upon industry income to support its activities and to increase productivity and employment, thus enhancing its popularity with the voting public.⁸³ The industry's economic strength makes it a powerful lobby group with considerable influence over policy development processes.⁸⁴ One public health interviewee said that food industry

⁸¹ SA Health, 'Discussion Paper: Australian Children's Exposure to the Advertising and Marketing of Energy-Dense, Nutrient-Poor Foods and Beverages: Strengthening Current Arrangements' (Government of South Australia, 9 May 2012) 16 <http://www.sahealth.sa.gov.au/wps/wcm/connect/879776804b29e174af00afe79043faf0/Food+marketing+seminar_9+May+2012_Discussion-paper.pdf?MOD=AJPERES&CACHEID=879776804b29e174af00afe79043faf0>.

⁸² See also Bebe Loff and Brad R Crammond, 'Wanted: Politicians to Champion Health (Not Obesity)' (2010) 192(7) *Medical Journal of Australia* 397; Australian Food and Grocery Council, '2020: Industry At A Crossroads' (Australian Food and Grocery Council, 2011) <<http://www.afgc.org.au/2020-industry-at-a-crossroads-report.html>>

⁸³ Loff and Crammond, above n 82, 397.

⁸⁴ See, e.g., Chung et al above n 11, 1125-1126. Nestle, *Food Politics*, above n 20; Simon 'PepsiCo and Public Health', above n 28.

representatives were skilled at drawing upon economic arguments to protect the industry's position, pointing out the impact of legislation on industry employment.⁸⁵

The industry has taken a proactive stance to criticisms of its role in the obesity epidemic, populating the regulatory space with a range of voluntary initiatives.⁸⁶ These include the *Code of Practice for Food Labelling and Promotion*, the Daily Intake Guide Labelling scheme and the 'Healthier Australia Commitment'.⁸⁷ One of the AFGC's roles is to point to the success of such voluntary programs and to vigorously resist any (government-led) alternatives. For example, Australian Health Ministers recently announced the introduction of a voluntary front-of-pack labelling system that gives processed foods a star rating based on their fat, sugar and saturated fat content.⁸⁸ The star system challenges the industry's own Daily Intake Guide labelling scheme, particularly as the Federal government will consider a mandatory program if star labelling is not widely adopted within two years.⁸⁹ Despite industry representation on the committee and working groups designing the scheme,⁹⁰ the AFGC immediately criticised star labelling, citing the high cost of implementation to the industry and the fact that it had not been subjected to a cost-benefit analysis.⁹¹ The AFGC argued that its own labelling scheme 'should remain as a foundation informative element on labels'.⁹² The industry's voluntary initiatives create de facto regulatory standards in labelling, marketing and product reformulation, which make it more difficult for the government to take control of the food regulatory space in circumstances when it is willing to regulate.

The government engages the food industry in the creation and delivery of a range of food policy initiatives. Food industry representation is included in the Food and Health Dialogue,

⁸⁵ A study of senior Australian policy experts from state and territory governments also found that these public servants saw the food industry as a significant barrier to government regulation of food advertising to children. See Chung et al, above n 11.

⁸⁶ See also Lois Dorfman et al, 'Soda and Tobacco Industry Corporate Social Responsibility Campaigns: How Do They Compare?' (2012) 9(6) *PLoS Medicine* e1001241, 4 <<http://www.plosmedicine.org/article/info%3Adoi%2F10.1371%2Fjournal.pmed.1001241>>.

⁸⁷ Chapter 9 above also discusses the industry's program of self-regulation. See Australian Food and Grocery Council, *Code of Practice for Food Labelling and Promotion* (January 2011) <<http://www.afgc.org.au/industry-codes/cop-food-labelling-a-promotion.html>>; Australian Food and Grocery Council, *Daily Intake Guide Labelling* (2010) <<http://www.afgc.org.au/daily-intake.html>>; Together Counts, *Healthier Australia Commitment Guiding Principles* (2012) <<http://www.togethercounts.com.au/healthier-australia-commitment/>>.

⁸⁸ Legislative and Governance Forum on Food Regulation, above n 75.

⁸⁹ *Ibid.*

⁹⁰ Department of Health and Ageing, *Front-of-Pack Labelling Committee and Working Group Meetings* (10 July 2013) Australian Government <<http://www.health.gov.au/internet/main/publishing.nsf/Content/frontofpackcommittee>>.

⁹¹ Australian Food and Grocery Council, *Key Flaws Unresolved with New Food Labelling System* (14 June 2013) <<http://www.afgc.org.au/media-releases/1555-key-flaws-unresolved-with-new-food-labelling-system.html>>.

⁹² *Ibid.*

along with government and public health members.⁹³ A representative of the food industry is also included on an expert committee that advises ANPHA on obesity prevention policy.⁹⁴

In May 2013, the Federal government announced Australia's first *National Food Plan*, which provides a policy framework for ensuring that Australia has a 'sustainable, globally competitive and resilient food supply that supports access to nutritious and affordable food'.⁹⁵ The government has recently established the Australian Council on Food to advise on food system issues and monitor the implementation of the Plan.⁹⁶ This Council will be chaired by the Department of Agriculture, Forestry and Fisheries and includes ministers with an interest in food and nutrition policy, as well as members of the manufacturing, retailing and transport sectors of the food industry and representatives from public health and consumer groups (among others).⁹⁷ The government is unlikely to introduce legislative measures that would risk jeopardising its collaborative relationship with the food industry, as well as the industry's engagement in voluntary programs. Indeed, the green paper for the National Food Plan restates the government's support for self-regulation of food advertising, saying that it:⁹⁸

... believes the best approach to reducing exposure of children and others to the marketing of unhealthy food is to work with industry under the existing combination of industry self-regulation and broader government regulation that governs food advertising to children.

Furthermore, there are strong political ideologies that would circumscribe the use of statutory regulation. The Australian government's regulatory policy favours reducing the regulatory burden and increasing economic productivity and efficiency.⁹⁹ It presumes that the least intrusive form of regulation should be used to address a problem, with legislation only justified where there is a strong public interest or public health concern; a high level of risk;

⁹³ Department of Health and Ageing, *Welcome to the Food and Health Dialogue Website* (2 March 2012) Australian Government <<http://www.foodhealthdialogue.gov.au/internet/foodandhealth/publishing.nsf>>.

⁹⁴ Australian National Preventive Health Agency, *ANPHA Expert Committee on Obesity (ECO)* (4 October 2011) <<http://www.anpha.gov.au/internet/anpha/publishing.nsf/Content/obesity-committee>>. The *Australian National Preventive Health Act 2010* (Cth) s 11(g) also requires ANPHA to encourage preventive health initiatives through partnerships with industry, NGOs and the community sector.

⁹⁵ Department of Agriculture, Fisheries and Forestry, *National Food Plan, Our Food Future* (Department of Agriculture, Fisheries and Forestry, 2013) 14 <<http://www.daff.gov.au/nationalfoodplan>>. A separate National Nutrition Policy 'will provide a framework for addressing key public health nutrition issues identified within the context of the government's preventive health agenda' (ibid).

⁹⁶ Department of Agriculture, Fisheries and Forestry, *Australian Council on Food - Terms of Reference* (14 June 2013) Australian Government <<http://www.daff.gov.au/agriculture-food/food/australian-council-on-food/tor>>.

⁹⁷ Ibid.

⁹⁸ Australian Government, *National Food Plan Green Paper 2012* (Department of Agriculture, Fisheries and Forestry, 2012) 101 <<http://www.daff.gov.au/nationalfoodplan/development/green-paper>>.

⁹⁹ See, e.g., Australian Government, 'Best Practice Regulation Handbook' (Australian Government, 2011) 1-5 <<http://www.finance.gov.au/obpr/proposal/gov-requirements.html>>. See also Loff and Crammond, above n 82, 397.

some form of market failure; or non-legislative options are unsuccessful.¹⁰⁰ Proposed regulation must also meet demanding cost-benefit and regulatory impact analyses,¹⁰¹ as with the ACMA's economic modelling of the economic costs and benefits of food advertising restrictions, which it undertook for the CTS review.¹⁰² Chapter 1 described how the ACMA declined to further restrict food advertising to children because of the impact on broadcaster revenue and profitability and the uncertain benefits to obesity prevention.¹⁰³

The government's neo-liberal agenda also influences food and nutrition policy, which has undergone reforms aimed at deregulating the food industry and maximising its profit and productivity.¹⁰⁴ Yet neo-liberal policy making often comes at the expense of the public health agenda (as illustrated by the US Interagency Working Group), which must compete with the goals of promoting economic growth and reducing regulatory burdens. These are typically the government's primary concerns rather than public health.¹⁰⁵

Although public health advocates argue for the application of the tobacco control model to food and alcohol, there are significant differences between the three products that make this unlikely. Table 22 below summarises the similarities and differences between food, tobacco and alcohol across a number of dimensions, some of which were discussed in previous chapters. Cigarette smoking is toxic, highly addictive and ultimately lethal.¹⁰⁶ Through second-hand smoke, tobacco users harm the health of non-smokers, including by causing respiratory illnesses in children and chronic diseases such as lung cancer.¹⁰⁷ Studies that linked smoking to disease set off a major shift in the cultural meaning of smoking and its social acceptability, as did declines in middle class smoking.¹⁰⁸ Cigarette smoking slowly

¹⁰⁰ Australian Government, 'Best Practice Regulation Handbook', above n 99, 34-35.

¹⁰¹ Ibid.

¹⁰² See Australian Communications and Media Authority, 'Review of the Children's Television Standards 2005: Final Report of the Review', above n 43.

¹⁰³ Ibid 9.

¹⁰⁴ Loff and Crammond, above n 82; Martin Caraher and John Coveney, 'Public Health Nutrition and Food Policy' (2004) 7(5) *Public Health Nutrition* 591; Heather Yeatman, 'Window of Opportunity - Positioning Food and Nutrition Policy within a Sustainability Agenda' (2008) 32(2) *Australia and New Zealand Journal of Public Health* 107; Mark Lawrence, 'Reflections on Public Health Policy in the Food Regulatory System: Challenges, and Opportunities for Nutrition and Food Law Experts to Collaborate' (2009) 14(2) *Deakin Law Review* 397.

¹⁰⁵ Loff and Crammond, above n 82, 397.

¹⁰⁶ Richard Doll et al, 'Mortality in Relation to Smoking: 50 Years' Observations on Male British Doctors' (2004) 328(7455) *British Medical Journal* 1529, 1530.

¹⁰⁷ US Department of Health and Human Services, 'The Health Consequences of Involuntary Exposure to Tobacco Smoke: A Report of the Surgeon General' (US Department of Health and Human Services, Public Health Service, Office of the Surgeon General, 2006)

<<http://www.surgeongeneral.gov/library/reports/secondhandsmoke/report-index.html>>.

¹⁰⁸ Ian Tyrrell, *Deadly Enemies: Tobacco and Its Opponents in Australia* (UNSW Press, 1999) 214-218; Harold A Pollack and Peter D Jacobson, 'Political Economy of Youth Smoking' (2003) 98(Suppl 1) *Addiction* 123;

moved from being an every-day part of life to being heavily stigmatised in many social circles and viewed almost as a moral failing.¹⁰⁹ Internal documents revealed the industry's deceptive and underhand practices, which along with its declining political and economic power, contributed to the 'denormalisation' of Big Tobacco.¹¹⁰ Successful litigation against the industry helped reframe cigarette smoking as an issue of corporate rather than personal responsibility, particularly as evidence of nicotine's addictiveness demonstrated that smoking was not simply a matter of individual choice.¹¹¹ Together these factors contributed to political and popular support for wide-ranging tobacco control measures, including statutory controls on its sale and distribution, bans on advertising and marketing, and pricing and taxation measures.¹¹² Increasing evidence of a causal relationship between children's exposure to cigarette advertising and smoking initiation provided further support for legislative restrictions on tobacco promotion.¹¹³

Simon Chapman and Becky Freeman, 'Markers of the Denormalisation of Smoking and the Tobacco Industry' (2008) 17(1) *Tobacco Control* 25.

¹⁰⁹ Ibid.

¹¹⁰ KM Cummings et al, 'Marketing to America's Youth: Evidence From Corporate Documents' (2002) 11(suppl 1) *Tobacco Control* i5; S M Carter, 'From Legitimate Consumers to Public Relations Pawns: The Tobacco Industry and Young Australians' (2003) 12 (Suppl III) *Tobacco Control* iii71; Donley T Studlar, 'The Political Dynamics of Tobacco Control in Australia and New Zealand: Explaining Policy Problems, Instruments, and Patterns of Adoption' (2005) 40(2) *Australian Journal of Political Science* 255.

¹¹¹ Melanie Wakefield, Kim McLeod and Katherine Clegg-Smith, 'Individual Versus Corporate Responsibility for Smoking-Related Illness: Australian Press Coverage of the Rolah McCabe Trial' (2003) 18 *Health Promotion International* 297; Michelle M Mello, Eric B Rimm and David M Studdert, 'The McLawsuit: The Fast-Food Industry and Legal Accountability For Obesity' (2003) 22(6) *Health Affairs* 207.

¹¹² David A Kessler et al, 'The Food and Drug Administration's Regulation of Tobacco Products' (1996) 335(13) *The New England Journal of Medicine* 989; Chris Reynolds, 'Health and Public Policy: The Tobacco Laws' in Fran Baum (ed), *Health for All: The South Australian Experience* (South Australian Community Health Research Unit in association with Wakefield Press, 1996) 215.

¹¹³ See, e.g., Joseph R DiFranza et al, 'Tobacco Promotion and the Initiation of Tobacco Use: Assessing the Evidence for Causality' (2006) 117(6) *Paediatrics* e1237.

Table 22. Similarities and differences between tobacco, alcohol and food

Type of product	Advertising restrictions	Policy and Regulatory environment	Nature and health harms	Evidence linking advertising and consumption	Social role	Industry activities	Government approach to industry	Public health position on the industry
Tobacco	Legislative bans on almost all forms of marketing and promotion.	Heavily regulated, with the goal of discouraging all forms of tobacco use.	An addictive and toxic drug, with no safe level of use. Causes significant morbidity and mortality globally.	Strong evidence of a causal link between advertising and the uptake of smoking among children and adolescents.	Smoking now 'denormalised' in Australian society and smokers are becoming a stigmatised social group.	Engaged in unscrupulous practices, including targeting young people for product development and promotion, denying health harms and addictiveness of tobacco use, lobbying against tobacco control.	Excludes the industry from processes of policy development and from participation in public health initiatives. Hostile relationship between the Australian industry and government.	Views tobacco companies as 'the enemy' and campaigns vigorously against industry activities.
Alcohol	Largely industry self-regulation but with some statutory restrictions on broadcast advertising.	Heavily regulated, but with few advertising restrictions. Policy aims to prevent underage drinking, reduce excessive or harmful consumption, but tolerates moderate consumption.	A potentially toxic drug. Low levels of consumption have pleasant effects and possibly some health benefits. Higher levels of consumption cause acute and chronic health harms.	A significant body of evidence shows that advertising influences children's preferences, beliefs and drinking behaviours.	Alcohol use is 'normalised' in Australian culture. However there is growing concern about 'binge drinking' among young Australians.	Undertakes similar activities to Big Tobacco, including denying health harms of product, developing own education programs and targeting the youth market.	Invites the industry to participate in public health policy, provides support for industry-based initiatives and works with the industry on alcohol harm prevention.	Some engagement with the alcohol industry, although there is concern about its level of involvement in public health policy.
Food	Almost entirely industry self-regulation with few statutory controls on marketing to children.	Comprehensive regulation of food safety; little preventive health regulation. Policy aims to decrease consumption of unhealthy foods.	Nutritionally complex, legally sold to children and is a necessity for life. Highly processed products are particularly implicated in obesity.	Some evidence exists, but more is needed on the causal pathways between advertising exposure and children's eating habits.	Consumption of unhealthy food forms part of children's social and family lives. Growing concern about products created for and marketed to children.	Uses the same tactics as other industries including distorting science, creating front groups, marketing to children, lobbying against legislation.	Invites industry to participate in public health initiatives, forms collaborative arrangements and encourages self-regulation.	Some scope for collaboration, but considerable debate over what form this should take and whether industry can be 'part of the solution' to obesity.

Food is a necessity of life and good nutrition contributes to growth and development during childhood and adolescence.¹¹⁴ Consumption can be either beneficial or detrimental to health, depending upon the types of foods people eat and in what quantity.¹¹⁵ Thus, it is more difficult for governments to regulate food compared to tobacco because of its nutritional complexity. Statutory regulation also faces the challenge that ‘junk’ food is a familiar part of children’s social and family lives.¹¹⁶ Compared to alcohol and tobacco, parents are slower to see confectionery, savoury snacks and sugary drinks as a threat to children’s health and ‘the public has not yet mobilised broadly around strategies to improve nutrition and physical activity for children and youth’.¹¹⁷ This may relate to the fact that popular and media discourses conceptualise childhood obesity as resulting primarily from parents’ failure to control children’s eating patterns and television viewing habits, rather than as a broader social problem.¹¹⁸ Thus, government intervention is often viewed as paternalistic, particularly as Big Food has not been held responsible for obesity in the same way as Big Tobacco has for the diseases caused by smoking.¹¹⁹ Further, while there is growing evidence linking obesity and children’s exposure to food marketing, compared to tobacco advertising ‘there have been far fewer studies that spell out the actual mechanisms of impact, and the literature has not coalesced around one causal model’.¹²⁰ This allows the food industry to dispute the connection between advertising and obesity and to argue that government regulation would be expensive, intrusive and unjustified.¹²¹

Similar factors underpin the government’s reluctance to restrict alcohol advertising. Like tobacco, alcohol is treated as a ‘special commodity’ because of its addictive and toxic

¹¹⁴ Jeffrey P Koplan, Catharyn T Liverman and Vivica I Kraak, *Preventing Childhood Obesity: Health in the Balance* (The National Academies Press, 2005) 33.

¹¹⁵ Derek Yach et al, 'The World Health Organisation's Framework Convention on Tobacco Control: Implications for Global Epidemics of Food-Related Deaths and Disease' (2003) 24(3-4) *Journal of Public Health Policy* 274, 275-276.

¹¹⁶ See, e.g., Juliet B Schor and Margaret Ford, 'From Tastes Great to Cool: Children's Food Marketing and the Rise of the Symbolic' (2007) 35(1) *The Journal of Law, Medicine and Ethics* 10, 16.

¹¹⁷ Jonathan D Klein and William Dietz, 'Childhood Obesity: The New Tobacco' (2010) 29(3) *Health Affairs* 388, 381. See also Kersch and Morone, above n 10, 147.

¹¹⁸ Deborah Lupton, "'A Grim Health Future": Food Risks in the Sydney Press' 6(2) *Health, Risk and Society* 187; Catriona M F Bonfiglioli et al, 'Choice and Voice: Obesity Debates in Television News' (2007) 187(8) *Medical Journal of Australia* 442; Amber Bastian, 'Representations of Childhood Obesity in Australia Newsprint Media and Academic Literature' (2011) 35(2) *Australian and New Zealand Journal of Public Health* 135.

¹¹⁹ See, e.g., Dorfman et al, above n 86; Mello, Rimm and Studdert, above n 111; LO Gostin and KG Gostin, 'A Broader Liberty: J S Mill, Paternalism and the Public's Health' (2009) 123(3) *Public Health* 214.

¹²⁰ Schor and Ford, above n 116, 14. See also Kathy Chapman, Bridget P Kelley and Lesley A King, 'Using a Research Framework to Identify Knowledge Gaps in Research on Food Marketing to Children in Australia' (2009) 33(3) *Australian and New Zealand Journal of Public Health* 253.

¹²¹ See e.g., the discussion on the Interagency Working Group on Food Marketing to Children above, as well Chapter 4.

properties.¹²² Although moderate alcohol use has few risks (and may be beneficial to the cardiovascular health of middle-aged drinkers),¹²³ excessive consumption causes acute and long-term health problems, resulting in significant morbidity and mortality.¹²⁴ It also causes harm to others, for example through interpersonal violence, adverse pregnancy outcomes and road crashes.¹²⁵ Accordingly, regulation restricts the availability of alcohol, prohibits sales to children and adolescents, and seeks to control its affordability through pricing and taxation.¹²⁶

While there is evidence that alcohol promotion influences young people's drinking behaviours,¹²⁷ regulatory reform is complicated by the fact that alcohol consumption is an everyday part of social life for many Australians (including young people).¹²⁸ This contributes to community acceptance of the alcohol industry and the perception that it has a legitimate right to advertise its products to adults.¹²⁹ According to the manager of one health advocacy organisation, public perceptions of the industry and its products undermined effective alcohol policy (including restrictions on alcohol advertising):

¹²² See Thomas Barbor et al, *Alcohol: No Ordinary Commodity* (Oxford University Press, 2nd ed, 2010).

¹²³ See, e.g., Susan E Brien et al, 'Effect of Alcohol Consumption on Biological Markers Associated with Risk of Coronary Heart Disease: Systematic Review and Meta-Analysis of Interventional Studies' (2011) 342 *British Medical Journal* d363 <<http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3043110/>>.

¹²⁴ See, e.g., Yvonne Bonomo et al, 'Adverse Outcomes of Alcohol Use in Adolescents' (2001) 96(10) *Addiction* 1845; Jürgen Rehm et al, 'Global Burden of Disease and Economic Cost Attributable to Alcohol Use and Alcohol-Use Disorders' (2009) 373(9682) *The Lancet* 2223, 2228; Australian Institute of Health and Welfare, 'Australia's Health 2012'. Australia's Health Series No 13. Cat No AUS 156 (AIHW, 2012) 228-234 <<http://www.aihw.gov.au/publication-detail/?id=10737422172>>.

¹²⁵ See, e.g., Yen F Tai, John B Saunders and David S Celermajor, 'Collateral Damage from Alcohol Abuse: The Enormous Costs to Australia' (1998) 168(1) *Medical Journal of Australia* 6; Anne-Marie Laslett et al, 'Surveying the Range and Magnitude of Alcohol's Harm to Others in Australia' (2011) 106(9) *Addiction* 1603.

¹²⁶ Barbor et al, above n 122; Wendy Loxley et al, 'Alcohol Policy and Harm Reduction in Australia' (2005) 24(6) *Drug and Alcohol Review* 559; Ministerial Council on Drug Strategy, 'National Drug Strategy 2010-2015' (Commonwealth of Australia, 2011) <<http://www.nationaldrugstrategy.gov.au/internet/drugstrategy/publishing.nsf/Content/nds2015>>.

¹²⁷ See, e.g., Gerard Hastings et al, 'Alcohol Marketing and Young People's Drinking: A Review of the Research' (2005) 26(3) *Journal of Public Health Policy* 296; Petra Meier et al, 'Independent Review of the Effects of Alcohol Pricing and Promotion' (School of Health and Related Research, University of Sheffield, 2008) 91 <http://www.shf.ac.uk/polopoly_fs/1.95617!/file/PartA.pdf>; P Andersen et al, 'Impact of Alcohol Advertising and Media Exposure to Adolescent Alcohol Use: A Systematic Review of Longitudinal Studies' (2009) 44(3) *Alcohol and Alcoholism* 229.

¹²⁸ See, e.g., Australian Institute of Health and Welfare, above n 124, 228; National Expert Advisory Committee on Alcohol, 'Alcohol in Australia: Issues and Strategies. A Background Paper to the National Alcohol Policy Strategy: A Plan for Action 2001 to 2003/04' (Department of Health and Ageing, 2001) 1-3 <[http://www.health.gov.au/internet/drugstrategy/publishing.nsf/Content/alc-strategy/\\$FILE/alcohol_strategy_back.pdf](http://www.health.gov.au/internet/drugstrategy/publishing.nsf/Content/alc-strategy/$FILE/alcohol_strategy_back.pdf)>; Richard Midford, 'Australia and Alcohol: Living Down the Legend' (2005) 100 *Addiction* 891, 892; Joseph Borlagdan et al, 'From Ideal to Reality: Cultural Contradictions and Young People's Drinking' (National Centre for Education and Training on Addiction, 2010) <http://www.decd.sa.gov.au/drugstrategy/files/links/From_Ideal_to_Reality_NCET.pdf>.

¹²⁹ Chapter 8 discussed how the normalisation of alcohol use impacts upon attempts to protect young people from alcohol advertising.

... it's really clear how the general public feels about tobacco companies now, and their take on Big Tobacco is a battle that the government wants to be seen to be taking, whereas... the alcohol industry's done really well to make sure that the general public feels robbed whenever the government tries to do anything in [alcohol policy], [which] has meant that the government doesn't want to take this on.

The fact that the government has not strengthened restrictions on alcohol promotion could suggest that it is unlikely to do so in relation to food advertising to children. This is especially the case given that the alcohol industry requires a more explicit social licence to operate than Big Food, and perceives itself to be subject to a higher level of government scrutiny (as described in Chapter 9).

An incremental approach to regulation of food advertising to children

Public health actors argue that the similarities between food, tobacco and alcohol are greater than they might appear at first glance, as are the activities of the three industries concerned.¹³⁰ Accordingly, they advocate for comprehensive statutory controls on food and alcohol advertising similar to those that now apply to tobacco. Yet the history of tobacco and alcohol advertising regulation indicates that food advertising regulation is more likely to develop in stages. Chapter 10 described how numerous government reviews have recommended that the ABAC Scheme be improved, yet the basic model of the ABAC has remained the same despite persistent concerns about the scheme's operation.¹³¹ The Federal government was hesitant to restrict tobacco advertising, despite mounting evidence of tobacco's harmful effects, and only did so in response to mounting pressure from state governments, successive federal health ministers and anti-tobacco advocates.¹³² Comprehensive measures like the *Tobacco Advertising Prohibition Act 1992* (Cth) followed only after the gradual implementation of legislative restrictions on different forms of tobacco marketing, beginning with broadcast advertising in the 1970s.¹³³ This suggests that statutory restrictions on food

¹³⁰ See Chapter 10 for further discussion of this point. See, e.g., Kersch and Morone, above n 10; Kelly D Brownell and Kenneth E Warner, 'The Perils of Ignoring History: Big Tobacco Played Dirty and Millions Died. How Similar Is Big Food?' (2009) 87 *The Milbank Quarterly* 259; Laura Bond, Mike Daube and Tanya Chikritzhs, 'Selling Addictions: Similarities in Approaches Between Big Tobacco and Big Booze' (2010) 3(6) *Australasian Medical Journal* 326; Mike Daube, 'Alcohol and Tobacco' (2012) 36(2) *Australia and New Zealand Journal of Public Health* 108; Rob Moodie et al, 'Profits and Pandemics: Prevention of Harmful Effects of Tobacco, Alcohol and Ultra-Processed Food and Drink Industries' (2013) 381 *The Lancet* 670.

¹³¹ See, e.g., Sandra C Jones, Danika Hall and Geoffrey Munro, 'How Effective is the Revised Regulatory Code for Alcohol Advertising in Australia?' (2008) 27(1) *Drug and Alcohol Review* 29; Simone Pettigrew, Rebecca Johnson and Mike Daube, 'Introducing and Applying a New Australian Alcohol Advertising Code' (2012) 13(1) *Journal of Public Affairs* 72.

¹³² See, e.g. Tyrrell, above n 108, 164; Robin Walker, *Under Fire: A History of Tobacco Smoking in Australia* (Melbourne University Press, 1984) 105-111.

¹³³ *Ibid.*

advertising in Australia are likely to develop incrementally – if they occur at all. The ABAC illustrates the very real possibility that the Federal government will leave food advertising regulation in the hands of the industry, although accompanied by some degree of public monitoring and oversight.

Co-regulation of food advertising to children in the UK

Food advertising restrictions in the United Kingdom suggest that governments are more likely to build upon existing industry-based schemes than move directly from self-regulation to legislation. Advertising in the UK is governed by industry self-regulation operating within a co-regulatory framework. This arrangement stems from the government's communications regulator (OfCom) contracting out some of functions to the Advertising Standards Authority (ASA) and the Committee of Advertising Practice.¹³⁴ These bodies administer the UK advertising industry's self-regulatory system for non-broadcast advertising, with CAP writing and maintaining the *UK Code for Non-Broadcast Advertising, Sales Promotion and Direct Marketing*,¹³⁵ and ASA managing and enforcing the code. Following the arrangement with OfCom, a new Broadcast Committee of Advertising Practice (BCAP) took responsibility for setting the *UK Code of Broadcast Advertising*¹³⁶ and monitoring broadcast advertising. A separate division of ASA (ASA(B)) adjudicates on complaints about broadcast advertising, but can refer complaints to OfCom where an advertiser does not comply with its decision.¹³⁷ OfCom retains backstop regulatory powers, for example it approves any changes to the *Code of Broadcast Advertising* proposed by BCAP.¹³⁸ OfCom may also insist that broadcast

¹³⁴ See The Contracting Out (Functions relating to Broadcast Advertising) and Specification of Relevant Functions Order 2004 (UK) SI 2004/1975, s 3; OfCom, *Memorandum of Understanding Between Office of Communications (OfCom) and the Advertising Standards Authority (Broadcast) Limited ('ASA(B')) and the Broadcast Committee of Advertising Practice Limited ('BCAP') and The Broadcast Advertising Standards Board of Finance Limited ('BASBOF')* (May 2004)

<http://stakeholders.ofcom.org.uk/binaries/consultations/reg_broad_ad/statement/mou.pdf>.

OfCom, *Television Food and Drink Advertising to Children: Final Statement* (OfCom, 22 February 2007) 1 <http://stakeholders.ofcom.org.uk/binaries/consultations/foodads_new/statement/statement.pdf>.

¹³⁵ Committee of Advertising Practice, *The CAP Code: The UK Code of Non-Broadcast Advertising, Sales Promotion and Direct Marketing* (2010) <<http://www.cap.org.uk/Advertising-Codes/Non-broadcast-HTML/Section-15-Food,-food-supplements-and-associated-health-or-nutritional-claims.aspx>>. Chapter 5 described how CAP (and BCAP) are two industry committees comprising representatives from advertisers media, agencies and other industry sectors. ASA is an independent organisation that acts as a regulator across all media. See Committee of Advertising Practice, *Our Committees* (2013) <<http://www.cap.org.uk/About-CAP/Who-we-are/Our-committees.aspx>>; Advertising Standards Authority, *About ASA* (2013) <<http://www.asa.org.uk/About-ASA.aspx>>.

¹³⁶ Committee of Advertising Practice, *The BCAP Code: The UK Code of Broadcast Advertising* (2010) <<http://www.cap.org.uk/Advertising-Codes/Broadcast/BCAP-Code.aspx>>.

¹³⁷ OfCom, *Memorandum of Understanding*, above n 134, 14.

¹³⁸ *Ibid* 15.

advertising rules be amended or introduced, and if BCAP refuses to do so, introduce a rule change or amendment itself.¹³⁹

Chapter 1 described how in 2003, the Secretary of State for Culture, Media and Sport asked OfCom to revise the *Code of Broadcast Advertising* in order to strengthen restrictions on food advertising to children.¹⁴⁰ Accordingly, OfCom commissioned a literature review of research on the effects of television advertising on children's food preferences.¹⁴¹ This 2004 study found evidence that advertising had a modest effect on children's food choices, which combined with community concerns about food advertising to children, led OfCom to conclude that it should devise new rules on unhealthy food advertising to children.¹⁴² Also in 2004, the Department of Health produced a White Paper on obesity, which reiterated the Government's view that there was a strong case for restrictions on television food advertising to children.¹⁴³ At the same time, the Food Standards Agency (FSA) published a consultation on a nutrient profiling scheme to identify unhealthy food products for the purposes of restrictions on television food advertising to children.¹⁴⁴

In March 2006, OfCom publicly consulted on a range of regulatory options, including a pre-9pm watershed ban on food advertising.¹⁴⁵ Following a further round of consultation,¹⁴⁶ OfCom decided to restrict unhealthy food advertising in and around children's programs and on dedicated children's channels.¹⁴⁷ These restrictions were based on the nutrient profiling

¹³⁹ Ibid 6.

¹⁴⁰ See OfCom, *Television Advertising of Food and Drink Products to Children: Final Statement* (22 February 2007) 1 <http://stakeholders.ofcom.org.uk/consultations/foodads_new/statement/>.

¹⁴¹ This research was described in Chapter 1. See Sonia Livingstone and Ellen Helsper, 'Advertising Foods to Children: Understanding Promotion in the Context of Children's Daily Lives' (Department of Media and Communications, London School of Economics and Political Sciences, May 2004) <http://stakeholders.ofcom.org.uk/market-data-research/other/tv-research/food_ads/>.

¹⁴² See OfCom, *Television Food and Drink Advertising to Children: Final Statement*, above n 140, 2. See also OfCom, *Childhood Obesity – Food Advertising in Context* (July 2004)

<http://stakeholders.ofcom.org.uk/market-data-research/other/tv-research/food_ads/>. Ofcom updated this research in 2005 by commissioning a literature review from Sonia Livingstone, a contributor to the original review (also discussed in Chapter 1). See Sonia Livingstone, 'New Research on Advertising Foods to Children' (Department of Media and Communications, London School of Economics and Political Science, 22 January 2006) <http://stakeholders.ofcom.org.uk/market-data-research/other/tv-research/food_ads/>.

¹⁴³ Department of Health, *Choosing Health: Making Healthier Choices Easier* (HM Government, 2004) 34-37 <http://webarchive.nationalarchives.gov.uk/20130107105354/http://www.dh.gov.uk/prod_consum_dh/groups/dh_digitalassets/@dh/@en/@ps/documents/digitalasset/dh_133489.pdf>.

¹⁴⁴ OfCom, *Television Food and Drink Advertising to Children: Final Statement*, above n 140, 2.

¹⁴⁵ OfCom, *Television Advertising of Food and Drink Products to Children* (28 March 2006) <<http://stakeholders.ofcom.org.uk/consultations/foodads/foodadsprint>>.

¹⁴⁶ OfCom, *Television Advertising of Food and Drink to Children: Options for New Restrictions* (8 June 2006) <<http://stakeholders.ofcom.org.uk/consultations/foodads/update/>>; OfCom, *Television Advertising of Food and Drink Products to Children: Statement and Further Consultation* (17 November 2006) <http://stakeholders.ofcom.org.uk/consultations/foodads_new/>.

¹⁴⁷ OfCom, *Television Food and Drink Advertising to Children: Final Statement*, above n 140, 2.

model finalised by the FSA in 2005, which companies used to identify products high in fat, salt and sugar that could not be advertised to children.¹⁴⁸ OfCom incorporated the new restrictions on food advertising in the existing *UK Code of Broadcast Advertising*.¹⁴⁹ In parallel, CAP modified rules on advertising techniques used to promote food and drink products to children (in all forms of advertising), contained in the *Code of Non-Broadcast Advertising*.¹⁵⁰ These rules restrict advertisements encouraging excessive consumption or suggesting a sedentary lifestyle, ‘pressure to purchase’ advertising, promotional offers and the use of celebrities and characters in promotions to children, among other things.¹⁵¹

I interviewed a representative of the ASA, who described both broadcast and non-broadcast advertising restrictions as evolving over time in response to public concerns and a changing evidence base. He stressed that the new restrictions on unhealthy food advertising built upon pre-existing rules for advertising to children, rather than constituting an entirely new form of regulation. He also said that:

[ASA]... chose... to advance the [non-broadcast advertising] restrictions, it’s not as if we’ve just introduced these rules... if you look at previous versions of the code we have several restrictions in there, we just... jumped them up... a little bit to bring them into a position which they consider to be akin to that in broadcast [advertising]...

The UK restrictions are some of the strongest controls on food advertising to children internationally.¹⁵² They have a number of benefits compared to the Australian self-regulatory system, including mandatory compliance by all advertisers (rather than only those that have joined the scheme). Nevertheless, they only affect ‘targeted’ children’s broadcasting rather than viewing periods where children comprise a substantial number of a mixed audience,

¹⁴⁸ Ibid 3.

¹⁴⁹ See Committee of Advertising Practice, *The BCAP Code: The UK Code of Broadcast Advertising*, above n 136, cl 32.5.1. According to the Code, companies must not advertise unhealthy products in or adjacent to programs commissioned for, principally directed at or likely to appeal particularly to audiences below the age of 16. The code relies upon audience indexing to determine whether programs are likely to appeal to children. See Broadcast Committee of Advertising Practice, *Audience Indexing: Identification of Television Programs Likely to Appeal to Children and Young People* (June 2010) Committee of Advertising Practice <<http://www.cap.org.uk/Advertising-Codes/Broadcast-HTML/Section-32-Scheduling-rules.aspx>>.

¹⁵⁰ See Committee of Advertising Practice, *The CAP Code: The UK Code of Non-Broadcast Advertising, Sales Promotion and Direct Marketing*, above n 135, cl 5. Note that these restrictions apply to all food and beverage products (with the exception of fresh fruit and vegetables) as this code does not use the FSA’s nutrient profiling model.

¹⁵¹ Ibid.

¹⁵² See Hawkes and Lobstein, above n 37, 89; Jean Adams et al, 'Effect of Restrictions on Television Food Advertising to Children on Exposure to Advertisements for "Less Healthy" Foods: Repeat Cross-Sectional Study' (2012) 7(2) *PLoS One* e31578 <<http://www.plosone.org/article/info%3Adoi%2F10.1371%2Fjournal.pone.0031578>>.

meaning that their effect on children's exposure to unhealthy food advertising is debated.¹⁵³ Also, the UK restrictions do not take the form of a legislative ban on food advertising, but operate through a co-regulatory system with advertising industry involvement. They are similar to the Protecting Children from Junk Food Advertising (Broadcasting and Telecommunications Amendment) Bill introduced by the Australian Greens Party in 2011 (which had not passed at the time of writing).¹⁵⁴ Through amendments to the *Broadcasting Services Act 1992* (Cth) the Bill would restrict unhealthy food advertising during children's peak television viewing periods, on subscription broadcast services intended for or primarily watched by children, on the internet and by 'commercial electronic message'. However, it seems clear that this Bill is unlikely to be passed, given the government's support for industry self-regulation and its commitment to monitor the RCMI and QSRI before taking any further action.

Strengthening controls on advertising of unhealthy food to Australian children

Although direct statutory regulation of food advertising is unlikely, this does not mean that the government is without options for improving the food marketing environment. Chapter 3 described how governments and other actors are searching for new ways to shape healthier choices that respect individual liberties and circumvent industry opposition.¹⁵⁵ Health organisations, public bodies and academics have proposed an incremental approach to strengthening existing initiatives as one way of navigating the barriers to government action.¹⁵⁶ For example, WHO suggests that governments identify priorities for regulating food

¹⁵³ Monitoring by OfCom suggests that the restrictions have substantially reduced children's exposure to unhealthy food advertising, with children seeing 34 per cent less of this advertising in 2007/08 compared to 2005. However independent research finds that there is still a large amount of unhealthy food advertising on television channels popular with children and during children's peak viewing times. Adams and colleagues found that children's exposure to unhealthy food advertising increased following the introduction of the new restrictions, despite high levels of compliance by advertisers. The researchers raised the possibility that advertisers simply shifted their advertising to different programs and channels in response to the restrictions. See Adams, above n 150. See also OfCom, *Changes in the Nature and Balance of Television Food Advertising to Children: A Review of HFSS Advertising Restrictions* (17 December 2008)

<<http://stakeholders.ofcom.org.uk/market-data-research/other/tv-research/hfssdec08/>>; Emma J Boyland et al, 'The Extent of Food Advertising to Children on UK Television in 2008' (2011) 6(5-6) *International Journal of Paediatric Obesity* 455; Jane Landon, 'News Report. Gaps and Weaknesses in Controls on Food and Drink Marketing to Children in the UK' (2012) 62 *Appetite* 187.

¹⁵⁴ See Parliament of Australia, *Protecting Children from Junk Food Advertising (Broadcasting and Telecommunications Amendment Bill 2011* (undated)

<http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=s827>.

¹⁵⁵ See, e.g., Magnusson and Reeve, above n 1; Nuffield Council on Bioethics, 'Public Health: Ethical Issues' (Nuffield Council on Bioethics, 2007) <<http://www.nuffieldbioethics.org/public-health>>; Richard H Thaler and Cass R Sunstein, *Nudge: Improving Decisions about Health, Wealth, and Happiness* (Yale University Press, 2008).

¹⁵⁶ See, e.g., Hawkes and Lobstein, above n 37; McGinnis, Gootman and Kraak, above n 39; National Preventative Health Taskforce, 'Australia: The Healthiest Country by 2020. National Preventative Health

advertising to children (such as controls on promoting specific products or in settings where children gather), which they gradually expand into comprehensive controls on all unhealthy food marketing.¹⁵⁷

While governments may be constrained in directly regulating business, Chapter 3 argued that the state retains a special role in public health law and regulation.¹⁵⁸ Where it relies upon private regulation to further public policy objectives, the government has a responsibility to act as guardian of the public's interest, i.e. to ensure that regulatory processes do not further private interests at the expense of public health goals.¹⁵⁹ 'Regulatory capitalism' creates scope for enhanced participation by public health and civil society actors in creating and implementing public health governance, as well as the food and alcohol industries.¹⁶⁰ Thus, government's role may be to structure the relationships between the different actors involved in regulation, to ensure that regulatory processes are transparent and accountable and reflect a balance of interests, as well as achieving their desired outcomes.

Government leadership in health can take a range of forms, from observation, monitoring and other forms of meta-regulation, to more directly restricting corporate practices.¹⁶¹ As suggested by responsive regulation, governments should move between these roles depending upon the health risks concerned, the efficacy of existing voluntary programs and the evidence base for action.¹⁶² Drawing upon literature from regulatory studies and public health law, I now propose ways in which the government could incrementally strengthen food industry self-regulation and, in doing so, fulfill its obligation to ensure that food advertising regulation achieves public health goals. Table 23 outlines a range of strategies for the Federal

Strategy – Overview', above n 39; Henney, Taylor and Boon, above n 39; World Health Organisation, 'Set of Recommendations on the Marketing of Foods and Non-Alcoholic Beverages to Children', above n 39; Blewett et al, above n 39.

¹⁵⁷ World Health Organisation, 'A Framework for Implementing the Set of Recommendations on the Marketing of Foods and Non-Alcoholic Beverages to Children' (World Health Organisation, 2012) 16 <http://www.who.int/dietphysicalactivity/framework_marketing_food_to_children/en/>.

¹⁵⁸ See, e.g., Gostin, above n 3; Nuffield Council on Bioethics, above n 153.

¹⁵⁹ David Cohen, 'The Role of the State in a Privatised Regulatory Environment' in Kernaghan Webb (ed), *Voluntary Codes: Private Governance, the Public Interest and Innovation* (Carleton Research Unit for Innovation, Science and Environment, Carleton University 2004) 25; Peter Vincent-Jones, 'Values and Purpose in Government: Central-Local Relations in Regulatory Perspective' (2002) 29(1) *Journal of Law and Society* 27; Ian Bartle and Peter Vass, 'Self-Regulation within the Regulatory State: Towards a New Regulatory Paradigm?' (2007) 84(5) *Public Administration* 885.

¹⁶⁰ Braithwaite, *Regulatory Capitalism*, above n 8. See also Lang, 'Food, the Law and Public Health', above n 3; Havinga, above n 35; Lang, Barling and Caraher, above n 35.

¹⁶¹ Peter Crampton, Janet Hoek and Robert Beaglehole, 'Leadership for Health: Developing a Canny Nanny State' (2011) 124(1329) *New Zealand Medical Journal* 66, 69. See also Gostin, above n 3; Nuffield Council on Bioethics, above n 153.

¹⁶² Ayres and Braithwaite, above n 2.

government to extend its influence over the RCMI and QSRI in the form of a more quasi- or co-regulatory scheme. These measures could be implemented through ‘legislative scaffolds’ that allow industry to continue with voluntary action but within a more extensive architecture of government intervention and oversight.¹⁶³ The following discussion describes selected measures in more detail.

¹⁶³ Magnusson and Reeve, above n 1.

Table 23. Ways for government to strengthen voluntary restrictions on food advertising to children¹⁶⁴

Component of regulation	Form of government intervention	Examples
Regulatory/policy framework	Determine overarching policy frameworks and objectives.	Preventing childhood obesity.
The content of regulation		
The goals of voluntary initiatives	Clearly identify the goals of self-regulation, and set objectively verifiable targets and performance indicators.	Reduce children’s exposure to unhealthy food advertising and the use of persuasive techniques in marketing to children.
The terms of voluntary initiatives	Define key terms and definitions underpinning voluntary schemes.	Broaden the definition of advertising/media ‘directed primarily to children’, and expand the communication channels, promotion techniques and age range of children covered by the initiatives. Create a nutrient profiling model that provides the basis for identifying unhealthy products and that applies to all code signatories.
Regulatory processes		
Administration	Provide for administration of the scheme by an independent body representing a wide range of interests.	Establish an administrative committee that includes equal representation from government, industry and public health sectors.
Monitoring	Ensure that the scheme includes systematic and independent monitoring.	Monitor the amount of unhealthy food advertising in children’s peak television viewing times and in other media. Monitor companies’ compliance with the initiatives, as well as the percentage of the food industry that has failed to join the scheme.
Review	Ensure that there is regular, independent and structured review of the scheme’s overall operation.	Commission an independent third-party review of the scheme.
Enforcement		
Incentives for compliance	Provide incentives that give participants an economic incentive to comply.	Publicise the RCMI and QSRI on government department websites, publicly release the results of monitoring activities.
Deterring non-compliance	Take steps to deter non-compliance at both company and industry levels.	Establish an independent body to hear complaints and sanction non-compliance through negative publicity and fines. Threaten escalation to co-regulation and legislation.

¹⁶⁴ This table builds upon one designed for research on voluntary salt reduction programs in Australia, jointly undertaken with Roger Magnusson.

Goals, targets and indicators

Addressing the risk factors for chronic disease requires a comprehensive, multi-sectoral approach, implying a basket of legal and policy interventions.¹⁶⁵ It demands collaboration between different government departments and levels of government, as well as various private actors. Accordingly, governments need to take leadership of health initiatives by setting clear objectives, and clarifying the roles and responsibilities of different parties in achieving these goals.¹⁶⁶ WHO recommends that the Ministry of Health establish a government-led working group on food marketing to children, with representation from multiple departments, agencies and bodies, to ensure government-wide consensus and cooperation on policies concerning food marketing on children.¹⁶⁷ This group could dialogue with a broader stakeholder committee that includes representatives of civil society, academia and the food, advertising and media industries.¹⁶⁸

The National Working Group on Food Marketing to Children (described above) represents the kind of multi-stakeholder group proposed by WHO, but its remit could be broadened to include the creation of key definitions and standards for the codes, as well other measures to strengthen the scheme's operation.¹⁶⁹ Strong government leadership of the scheme would ensure that the objectives of self-regulation are aligned with public health goals, as well as the food and nutrition policy framework more broadly. It also diminishes the risk that private sector actors will step into the 'regulatory space' created by government inaction.¹⁷⁰ It is crucial that the government set clear goals and targets for the RCMI and QSRI, given that the codes are premised on different objectives to those advocated by public health groups, and there is significant debate on what they should aim to achieve.

¹⁶⁵ Roger Magnusson, 'What's Law Got To Do With It? Part 1: A Framework for Obesity Prevention' (2008) 5(10) *Australia and New Zealand Health Policy* 15 <<http://www.publish.csiro.au.ezproxy2.library.usyd.edu.au/nid/278/issue/5796.htm>>; G Sacks, B Swinburn and M Lawrence, 'Obesity Policy Action Framework and Analysis Grids for a Comprehensive Policy Approach for Reducing Obesity' (2009) 10(1) *Obesity Reviews* 76.

¹⁶⁶ World Health Organisation, 'Set of Recommendations on the Marketing of Foods and Non-Alcoholic Beverages to Children', above n 39, 9; Yeatman, above n 104, 108; World Health Organisation, 'A Framework for Implementing the Set of Recommendations on the Marketing of Foods and Non-Alcoholic Beverages to Children', above n 157, 32.

¹⁶⁷ World Health Organisation, 'A Framework for Implementing the Set of Recommendations on the Marketing of Foods and Non-Alcoholic Beverages to Children', above n 157, 13.

¹⁶⁸ Ibid.

¹⁶⁹ Ibid.

¹⁷⁰ See, e.g., William H Wiist, 'The Corporate Playbook, Health and Democracy: The Snack Food and Beverage Industry's Tactics in Context' in David Stuckler and Karen Siegel (eds), *Sick Societies: Responding to the Global Challenges of Chronic Disease* (Oxford University Press, 2011) 204; David Miller and Claire Hawkins, 'Corporate Strategy, Corporate Capture: Food and Alcohol Industry Lobbying and Public Health' (2010) 30(4) *Critical Social Policy* 564.

Coverage of the scheme: terms and definitions

Governments should specify the key terms, standards and definitions that underpin voluntary initiatives.¹⁷¹ For instance, governments should require that restrictions on food advertising apply to marketing defined very broadly, including product placement, direct marketing, packaging and labelling, sponsorship, brand promotions and advertising using digital media.¹⁷² Other key definitions include the age of children, media directed to children, persuasive techniques that particularly appeal to children and the types of unhealthy foods and beverages covered by self-regulation.¹⁷³ The RCMI and QSRI would be significantly improved if they used standard nutrition criteria developed by a government agency to identify products that are appropriate to market to children.¹⁷⁴ The nutrient profiling tool created by the Australia New Zealand Food Standards Authority for nutrition and health claims on food labels could be used for this function, as it is adapted from the nutrient profiling scheme that underpins UK restrictions on unhealthy food advertising to children.¹⁷⁵ As discussed above, the Food Regulatory Standing Committee is considering this issue, but at the time of writing had not yet provided its advice on an appropriate nutrient profiling scheme to be used in restricting food advertising to children.

Monitoring and evaluation

Governments should provide for independent monitoring and oversight of voluntary schemes. This may involve establishing or appointing an institution or agency to monitor and oversee self-regulation.¹⁷⁶ Chapter 7 argued for a new management structure for the RCMI and QSRI, using an independent body that comprises representatives from a wide range of interested parties, including consumer organisations, government and NGOs, industry actors and

¹⁷¹ SA Health, above n 81, 17; World Health Organisation, 'A Framework for Implementing the Set of Recommendations on the Marketing of Foods and Non-Alcoholic Beverages to Children', above n 157, 21.

¹⁷² World Health Organisation, 'A Framework for Implementing the Set of Recommendations on the Marketing of Foods and Non-Alcoholic Beverages to Children', above n 157, 9-10.

¹⁷³ Ibid 21. See also Chapter 6, which provides a comprehensive set of recommendations for improving the terms and conditions of the RCMI and QSRI.

¹⁷⁴ Ibid 26. See also National Preventative Health Taskforce, 'Australia: The Healthiest Country by 2020. National Preventative Health Strategy – Overview', above n 39, 14; Lana Hebden et al, 'Regulating the Types of Foods and Beverages Marketed to Australian Children: How Useful are Food Industry Commitments?' (2010) 67(4) *Nutrition and Dietetics* 258, 265.

¹⁷⁵ Hebden et al, above n 174, 265; H Brinsden and T Lobstein, 'Comparison of Nutrient Profiling Schemes for Restricting the Marketing of Food and Drink to Children' (2013) Early Online *Paediatric Obesity* 3 <<http://onlinelibrary.wiley.com/doi/10.1111/j.2047-6310.2013.00167.x/full>>

¹⁷⁶ World Health Organisation, 'A Framework for Implementing the Set of Recommendations on the Marketing of Foods and Non-Alcoholic Beverages to Children', above n 157, 33.

participants to the initiative.¹⁷⁷ An alternative may be to grant administration of the scheme to a government body, with the potential for regulatory tasks to be delegated to private actors. Chapter 7 also described how voluntary programs should provide for systematic and independent monitoring, including collection and analysis of information on compliance, participants' progress towards the scheme's targets, and its success in meeting public objectives.¹⁷⁸ To support monitoring activities, governments should also ensure that there is a framework for independent, regular review of the scheme.¹⁷⁹ Although ANPHA is in the process of developing a monitoring framework for food industry self-regulation, this could be strengthened by committing the government (or an independent third-party) to periodic review of the scheme after the first round of monitoring is complete.

Incentives for compliance

A key role for governments is to provide incentives for companies to join voluntary schemes and then to change their products and practices in line with their commitment. Governments can take a number of steps to encourage compliance, for example publicity campaigns that enhance consumer understanding of the scheme and how it works.¹⁸⁰ Public education about the codes should be within the context of the explicit goals that government has adopted and which industry codes are expected to contribute towards, i.e. reducing children's exposure to unhealthy food advertising. The government could also provide information about the RCMI and QSRI on relevant department websites, which would assist consumers in laying complaints about food advertising with the ASB.

Publicising the RCMI and QSRI could draw public attention to companies' advertising practices and challenge parents to think about purchasing products from companies with more constructive marketing strategies. However, Chapter 8 questioned whether consumers

¹⁷⁷ See SA Health, above n 81, 17; Australian Competition and Consumer Commission, 'Guidelines for Developing Effective Voluntary Codes of Conduct' (Commonwealth of Australia, July 2011) 8 <<http://transition.accc.gov.au/content/index.phtml/itemId/658186>>; Susannah Tymms, 'Responsible Advertising to Children: An Independent Review of the Australian Food and Beverage Industry Self-Regulatory Codes' (Australian Food and Grocery Council, October 2012) 63 <<http://www.afgc.org.au/industry-codes/advertising-to-children/rcmi/rcmi-reports-2009.html>>.

¹⁷⁸ Australian Competition and Consumer Commission, above n 177, 14, Taskforce on Industry Self-Regulation, 'Industry Self-Regulation in Consumer Markets' (Australian Government, August 2000) 78 <<http://archive.treasury.gov.au/contentitem.asp?ContentID=1131>>.

¹⁷⁹ Australian Competition and Consumer Commission, above n 177, 13.

¹⁸⁰ Mello, above n 14, 269; World Health Organisation, 'A Framework for Implementing the Set of Recommendations on the Marketing of Foods and Non-Alcoholic Beverages to Children', above n 157, 33-34; Australian Competition and Consumer Commission, above n 176, 7; Taskforce on Industry Self-Regulation, above n 178, 60; Karen Yeung, 'Government by Publicity Management: Sunlight or Spin?' (2005) 2 *Public Law* 360.

are capable, in a practical sense, of purchasing products only from companies that comply with the initiatives.¹⁸¹ The fact that consumers do not make purchasing choices based on compliance with self-regulation closes off one avenue for code participants to benefit commercially from the scheme. However, disclosing information about companies' performance (and that of self-regulation overall) can still enhance NGOs' watchdog role and place pressure on industry actors to deliver on their voluntary commitments, due to its effects on corporate reputations.¹⁸²

Enforcing compliance and deterring 'free-riders'

Governments should consider ways to deter non-compliance and prevent companies 'free-riding' on voluntary schemes.¹⁸³ Chapter 7 described how self-regulation should provide for both informal sanctions and more punitive options for on-going or serious non-compliance.¹⁸⁴ As the food industry's scheme is voluntary there is little chance of direct government enforcement, unless breaches of the initiatives also represent non-compliance with public regulation such as the CTS 2009.¹⁸⁵ However, there are a number of routes by which the government could strengthen existing enforcement arrangements. For example, it could 'shame' the industry into compliance by publicising negative results from any monitoring and review activities. Given the difficulties that the public has in identifying advertisements that breach the codes, ANPHA's monitoring frameworks could strengthen enforcement by systematically identifying instances of non-compliance. This would also assist public health groups in laying tactical complaints with the ASB that are intended to test the scheme's operation and expose its loopholes. An alternative option is that the government could require an independent administrative body (described above) to hear complaints and sanction non-compliance through fines or negative publicity.¹⁸⁶ The government could also mandate or

¹⁸¹ See, e.g., Sarah MacKay, 'Food Advertising and Obesity in Australia: To What Extent Can Self-Regulation Protect the Interests of Children?' (2009) 35 *Monash University Law Review* 118, 127.

¹⁸² World Health Organisation, 'A Framework for Implementing the Set of Recommendations on the Marketing of Foods and Non-Alcoholic Beverages to Children', above n 157, 34.

¹⁸³ Neil Gunningham and Joseph Rees, 'Industry Self-Regulation: An Institutional Perspective' (1997) 19(4) *Law & Policy* 363, 394; Neil Gunningham, Peter Grabosky and Darren Sinclair, *Smart Regulation: Designing Environmental Policy* (Clarendon Press, 1998) 150.

¹⁸⁴ See, e.g., Ayres and Braithwaite, above n 2; Australian Competition and Consumer Commission, above n 177, 11.

¹⁸⁵ As discussed in Chapter 2, the ACMA can directly enforce breaches of the CTS 2009 as broadcast licensees must comply with the Standards as a licensing condition (see *Broadcasting Services Act 1992* (Cth) sch 2, cl 7(1)(b).)

¹⁸⁶ World Health Organisation, 'A Framework for Implementing the Set of Recommendations on the Marketing of Foods and Non-Alcoholic Beverages to Children', above n 157, 35.

encourage the industry to pre-vet food marketing, particularly advertisements broadcast on television.

Perhaps the most significant deterrent to non-compliance is for the government to indicate its willingness to escalate to more intrusive options if self-regulation fails to achieve public objectives.¹⁸⁷ Responsive regulation argues that effective voluntary measures rely upon the threat of statutory regulation, which gives the pyramid of regulation its pointy tip.¹⁸⁸ According to public health interviewees, one critical flaw in the current regime was that the self-regulatory regimes were weak and ineffective, and that there were no real incentives for industry to improve the performance or management of these schemes, including little credible threat of government regulation.¹⁸⁹ Indeed, the government did not explicitly commit to the possibility of intervention in its response to the National Preventative Health Taskforce (which recommended that it do so), and has remained silent on this issue since.¹⁹⁰

ANPHA's monitoring activity could be construed as a tacit threat that the government will directly regulate food advertising to children, if monitoring shows that the voluntary scheme is ineffective. However, by communicating this threat explicitly, the government gives the food industry an incentive to comply with self-regulation and even to improve its voluntary standards. This appears to be one of the few benefits of the US Interagency Working Group's proposal for uniform nutrition criteria – that it placed pressure on the food industry to create more demanding uniform standards (rather than permitting self-regulation participants to choose their own).¹⁹¹ Further, by taking a phased approach to intervention, the government gives itself a stronger justification for introducing coercive measures once self- or co-regulation has failed, helping it to negotiate the significant political barriers to statutory regulation.

¹⁸⁷ Ayres and Braithwaite, above n 2, 47-49; Gunningham and Rees, above n 183, 401 (see also the discussion in Chapter 2).

¹⁸⁸ Ayres and Braithwaite, above n 2, 39.

¹⁸⁹ Chapter 10 also discussed the government's reluctance to regulate food advertising to children.

¹⁹⁰ See Australian Government, 'Taking Preventative Action: A Response to Australia: The Healthiest Country by 2020, The Report of the National Preventative Health Taskforce', above n 46, 46.

¹⁹¹ For other examples of the threat of government regulation providing impetus for industry action, see Hawkes, 'Regulating Food Marketing to Young People Worldwide', above n 10, 1968; Michelle M Mello, Jennifer Pomeranz and Patricia Moran, 'The Interplay of Public Health Law and Industry Self-Regulation: The Case of Sugar-Sweetened Beverage Sales in Schools' (2008) 98(4) *American Journal of Public Health* 595, 602; Laurian J Unnevehr and Evelina Jagmanaitė, 'Getting Rid of Trans Fats in the US Diet: Policies, Incentives and Progress' (2008) 33(6) *Food Policy* 497.

Escalating controls

There are a variety of ways in which the government could take an escalating approach to controls on food advertising to children; however I propose that it develop the scheme into a form of co-regulation. By creating legislative infrastructure the government could require registration or approval of industry codes, and could identify the particular objectives and issues that the codes must cover. This scheme can be contrasted to the current self-regulatory arrangements, which are still industry developed and controlled, with the government relying upon political pressure to persuade the food industry to strengthen the terms and conditions of the initiatives. Adding ‘legislative scaffolds’ to self-regulation would not necessarily preclude industry from participating in processes of code development, administration and enforcement. However, it would impose real pressure on industry to take regulation seriously, as it becomes easier for governments to prescribe a code, or part of the content of a code, as well as to build in new regulatory requirements if an improved co-regulatory regime proves ineffective. The government could put these measures into effect by creating new legislation or by making amendments to the *Broadcasting Services Act 1992* (Cth). The Act requires registration of the broadcast industry’s codes of conduct (described in Chapter 2), setting a precedent for this form of co-regulation for broadcast advertising.¹⁹²

Incremental improvement of advertising content standards

Once the basic regulatory arrangements for the codes are in place, government should progressively build upon co-regulation to ‘ratchet up’ the standards governing food marketing to children, if monitoring shows that improved regulatory arrangements do not reduce children’s exposure to unhealthy food advertising. Box 5 below outlines a staged, co-regulatory approach to restricting food advertising to children. It takes into account the fact that the government is unlikely to introduce additional restrictions on food advertising before ANPHA finalises the new monitoring arrangements for the RCMI and QSRI. As Stage three illustrates, the government should consider legislative bans on unhealthy food advertising, if a voluntary scheme with stronger government intervention fails to meet targets and goals for reducing children’s exposure to unhealthy food advertising.

¹⁹² *Broadcasting Services Act 1992* (Cth) pt 9.

Box 5. A responsive approach to strengthening food industry self-regulation

Stage one	<ul style="list-style-type: none"> • The Food Regulatory Standing Committee creates a nutrient profiling scheme to be used in identifying products that are appropriate for advertising to children. • In collaboration with the food industry and public health organisations, the government sets the goals, targets and indicators to be achieved by the RCMI and QSRI. • The food industry revises the RCMI and QSRI in accordance with the targets and objectives proposed by government. • ANPHA finalises the monitoring framework for the codes and commits to periodic review of restrictions on food advertising to children. • The government communicates to the food industry that more intrusive co-regulation will follow if a stronger voluntary scheme fails to reduce children’s exposure to unhealthy food advertising.
Stage two	<ul style="list-style-type: none"> • ANPHA reports on the results of monitoring and undertakes an independent review of the scheme. • If evaluation shows that self-regulation is failing, the government introduces co-regulation that requires government approval/registration of food advertising codes. • The government uses co-regulation to specify key objectives, terms and definitions for regulation of food advertising to children, including ‘media directed to children’, ‘advertising directed to children’, the age range covered by the codes and the media channels and marketing techniques that restrictions apply to. • Legislative scaffolding also establishes an independent committee to administer and enforce the RCMI and QSRI, and an independent panel to hear consumer complaints about unhealthy food advertising to children.
Stage two	<ul style="list-style-type: none"> • The government introduces mandatory pre-vetting for food advertising to children (for companies with a defined advertising spend) if monitoring shows that the improved scheme has not reduced children’s exposure to food advertising. • The government provides for more punitive enforcement measures, e.g., fines and targeted adverse publicity. • It also communicates to the food industry that legislation will be introduced if co-regulation proves unsuccessful in moderating children’s exposure to food advertising.
Stage three	<ul style="list-style-type: none"> • The government introduces legislative restrictions on unhealthy food advertising during children’s peak television viewing periods and in other media, as well as on commonly used persuasive techniques, if co-regulation fails to reduce children’s exposure to unhealthy food advertising.

4. Conclusion

Despite increasing government oversight of food industry self-regulation, I argue that there is further scope for government intervention in the operation of the RCMI and QSRI. However, I outlined a series of barriers to prescriptive command-and-control regulation in this area, not the least of which is the significant power of the food industry. In this context I proposed that the Federal government draw upon novel forms of intervention to incrementally strengthen these initiatives and provide for further government oversight. Through co-regulation the Federal government could set the objectives, definitions and institutional arrangements for the codes, while allowing industry to implement restrictions on food marketing to children voluntarily. I also proposed that the government take a dynamic approach to food marketing regulation. This could have two components: progressively ‘ratcheting up’ the substantive conditions of the codes, as well as introducing increasingly more intrusive regulation to give effect to the initiatives’ requirements. In line with responsive regulation, one of the most critical components of this strategy is that the government explicitly communicates to industry that it will introduce statutory regulation if voluntary or co-regulatory programs fail to reduce children’s exposure to unhealthy food advertising.

CONCLUSION

The dramatic increase in childhood obesity poses an immediate threat to children's health, as well as to the health of future generations of adults. If continuing unchecked, it could place a significant economic strain on Australia's healthcare system through its contribution to the burden of chronic disease. The food industry makes a significant contribution to weight by developing and marketing unhealthy food to children. Big Food spends considerable sums of money on sophisticated marketing strategies that target young people, using a wide range of communication channels and promotional techniques. Evidence shows that this advertising affects children's food preferences and choices, their actual consumption patterns and their diet-related health, independent of other factors. Accordingly, governments, consumers, parents and public health organisations have become increasingly concerned about the marketing practices of the food industry.

The food industry has responded to the risks posed by childhood obesity by developing voluntary advertising codes that have filled the food regulatory space and operate as de facto regulatory standards. In Australia, the industry created two such codes, *The Responsible Children's Marketing Initiative of the Australian Food and Beverage Industry* and the Australian Quick Service Restaurant Industry's *Initiative for Responsible Advertising and Marketing to Children*. As with self-regulatory 'pledges' in other jurisdictions, these controls are weak and the industry has been resistant to strengthening them in a manner that would significantly reduce children's exposure to unhealthy food advertising. However, the Australian Federal government has been politically unable or unwilling to impose more direct statutory controls. The regulatory dilemma posed by this situation is the key challenge that this thesis addresses.

In 2009 the National Preventive Health Taskforce released its report on reducing the burden of disease caused by tobacco use, excessive alcohol consumption and obesity.¹ The Taskforce noted critical flaws in food industry self-regulation and proposed responsive regulation as a means of strengthening controls on unhealthy food advertising to children. Its strategy began

¹ National Preventive Health Taskforce, 'Australia: The Healthiest Country by 2020 - National Preventive Health Strategy - Overview' (Commonwealth of Australia, 2009) <<http://www.preventivehealth.org.au/internet/preventivehealth/publishing.nsf/Content/national-preventive-health-strategy-11p>>.

with government monitoring of the voluntary codes followed by the introduction of co-regulation to address any limitations in the scheme. This would ultimately lead to legislation that banned unhealthy food advertising before 9pm if co-regulation was ineffective in reducing children's exposure to such advertising.

Consistent with the recommendations of the Taskforce, this thesis applied a responsive regulatory approach to self-regulation of food advertising to children in Australia. It assessed the content of, and regulatory processes established by, the RCMI and QSRI in order to understand why these codes do not reduce the amount of unhealthy food advertising children see. The overall goal of the thesis was to determine whether escalation to more intrusive forms of regulation was justified, and what form of government intervention might be appropriate. My research found that food industry self-regulation is failing Australian children. There are critical loopholes in the substantive conditions contained in the initiatives and significant flaws in the design and implementation of the scheme. The institutional arrangements for self-regulation lack transparency and accountability, particularly because of their narrow scope for external stakeholder participation. Public health organisations place pressure on the food industry to comply with the codes and improve advertising practices, but government intervention in food industry self-regulation is insufficient to produce an industry-based scheme that truly furthers public health objectives.

1. The content of the RCMI and QSRI

The RCMI and QSRI contain numerous escape clauses in their substantive terms and coverage. The codes only apply to 'media directed primarily to children', rather than media with substantial adult and child audiences. This allows participants to market their products during television programs with large child audiences. The definition of 'advertising directed primarily to children' still permits food advertisers to use a range of creative techniques that young people find appealing, including toys, animated characters and scenes of children playing. The codes exclude a number of key communication channels and marketing techniques, particularly digital media, product packaging and labelling, brand promotion and many forms of industry sponsorship. Further, the Advertising Standards Board (ASB) interprets the codes' provision on 'premium offers' as permitting food companies to market non-food items as part of children's meals or food products, rendering this provision virtually meaningless. Under the RCMI, signatory companies use their own nutrient profile models to determine which of their products may be marketed to children. This renders the scheme

complex, confusing and weak, and enables participants to market most of their (unhealthy) products to children. The nutrient profile model attached to the QSRI sets high thresholds for undesirable nutrients and energy content. Further, it only covers children's meals, which represent a fraction of the products promoted by fast-food restaurants.

The cumulative effect of these escape clauses is that the initiatives contain weak standards that apply to only very little food advertising viewed by children, even if they reduce food advertising during designated children's programs. These loopholes in the terms and conditions of the codes must be closed off if self-regulation is to moderate the volume, and persuasive power of food advertising that children see. As Handsley argues,² this means revising the regulatory axes along which these schemes are designed, including the concepts of 'media directed primarily to children', 'advertising directed primarily to children', the definition of children, the communication channels and marketing techniques covered by the codes, and the nutrition criteria used to identify 'healthier choice' products.

2. The design of regulatory processes

Furthermore, the governance processes established by the RCMI and QSRI are critically flawed. The codes' vague objectives leave them open to debate about what they aim to achieve (and what they should aim to achieve), and undermines independent evaluation of the scheme. The food industry argues that the codes seek to reduce unhealthy food advertising that targets children specifically, whereas the goal for public health advocates is to substantially reduce children's total *exposure* to unhealthy food advertising and promotions.

The main monitoring mechanism draws upon participant self-reporting, which is highly variable and relies upon companies' willingness to disclose serious breaches. The AFGC monitors the scheme independently of participants, but its reports only consider advertising for unhealthy food that is 'directed primarily to children' (rather than the amount of this advertising viewed by children), and they do not fully record all instances of non-compliance. Accordingly, the performance of the RCMI and QSRI is not subject to systematic and independent monitoring. Additionally, it is difficult for members of the public to use the complaint hearing mechanism via the ASB, given the complex nature of the scheme. Yet there are few other options for enforcing self-regulation given that the AFGC is a food industry representative body and does not engage in 'naming and shaming' code signatories,

² Elizabeth Handsley et al, 'Regulatory Axes on Food Advertising to Children on Television' (2009) 6(1) *Australia and New Zealand Health Policy* 1.

nor is it willing to consider more punitive options. Although the scheme has benefited from independent external review, the AFGC has not committed to on-going external evaluation of the scheme's success against objective performance criteria.

Most important, the industry developed the scheme with little participation from external stakeholders, and largely excludes them from routine administrative and enforcement processes, meaning that the codes' governance processes are almost entirely industry based. Together with the other limitations in self-regulatory processes, lack of external stakeholder participation significantly undermines the transparency and accountability of self-regulation. It also suggests that industry adopted the initiatives to give the appearance of regulation rather than to address the actual concerns of parents, governments, public health advocates and other NGOs. Thus, it is unsurprising that the schemes lack credibility with public health researchers, and have failed to address community concerns about food advertising and childhood obesity. A more effective and democratic system would require external stakeholders to be more fully incorporated into administration, monitoring and enforcement activities. This is particularly the case considering that self-regulation is presented as an alternative to a more publicly accountable system based on statutory regulation.

3. Institutional influences on food industry self-regulation

I have documented several institutional constraints on the industry's ability to adopt a more effective voluntary program. The food industry is dominated by large, multinational companies, enabling wide code coverage even with a handful of participants. However, key industry players have not joined the codes, including supermarket giants Coles and Woolworths, which play an increasingly important role in food retail and promotion. The diverse and complex nature of food products also makes self-regulation more prone to failure, as consumers cannot tell which products belong to code signatories, even if they were aware of the codes. Also, consumers are unlikely to purchase products based on a company's responsible marketing practices, which means that market pressure cannot be harnessed as an economic incentive for companies to join and comply with the scheme. Further, there is ongoing debate about how to use nutrient profile models to classify food products for the purposes of marketing to children, which potentially impacts upon the efficacy of self-regulation. This is particularly the case when companies are permitted to devise their own weak standards for identifying products appropriate for marketing to children.

The food industry possesses the institutional structures for effective self-regulation, namely an active trade association that can unite companies behind voluntary programs. The AFGC proactively administers the RCMI and QSRI and assists participants with compliance. By using the ASB to hear complaints about food advertising, the scheme also benefits from connections to the broader advertising self-regulatory framework. However, the administration of the codes by a trade industry association undermines the real and perceived impartiality and effectiveness of governance processes. The scheme is also vulnerable to free-riding, given the AFGC's failure to enforce the initiatives and the lack of economic incentives for companies to join the scheme. Industry developed the codes under pressure from government, consumer groups and health advocates, and as a means to improve its collective reputation. Apart from managing political pressures, there is little evidence that the food industry has a genuine, widespread commitment to obesity prevention, especially given the fundamental conflict of interest between the industry's profit and reducing unhealthy food advertising to children. In these circumstances, self-regulation does not represent a 'win-win' situation for industry and the public. This leads to the conclusion that government intervention will be needed to produce a scheme that significantly reduces children's exposure to unhealthy food advertising.

4. Corporate practices and the implementation of the codes

Voluntary advertising codes are one example of Big Food's adoption of complex corporate social responsibility strategies regarding the nutritional quality and marketing of companies' products. Within this context, I considered the reasons why multinational food and alcohol companies join industry codes of conduct and the steps they take to implement self-regulation. Respondents I interviewed reported a genuine desire to 'do the right thing' and to market their products to children responsibly. Compliance with self-regulation also supported their core business model and other social responsibility projects, including at the global level. Thus, spokespeople from companies reported inter-twined economic and ethical reasons for joining voluntary codes, reinforced by implicit pressure from pledges and guidelines being introduced in other countries, as well scrutiny from governments, advocacy groups and consumers. Interviewees also discussed the importance of protecting the industry's reputation and expressed concern that their commitments were being undermined by other signatories engaging in 'creative compliance', or by companies that failed to join the

scheme. A community of ‘shared fate’ does appear to exist in the food industry where poor practices by one firm may jeopardise the reputation of the industry as a whole.

Interviewees described compliance practices that aligned with their commitment to responsible marketing, including modifying policy documents; training employees and external partners; re-structuring internal compliance systems; senior management engagement; and reporting on compliance. The interviews suggested that companies put significant time and effort into complying with the RCMI and QSRI, a perspective that is also reflected in the AFGC’s monitoring reports. Yet independent research shows that these and other voluntary initiatives have had little ‘real-world’ impact on the food marketing environment. A key explanation for this contradiction is that code participants (at least some of them) are implementing voluntary standards that do not require them to significantly alter their marketing practices. Rather, self-regulation simply rolled out existing best practice standards across the industry, with the goals of allowing companies to police each other’s behaviour, improving the industry’s reputation and deflecting government interest in regulating food advertising. The RCMI and QSRI could be used to ratchet up marketing standards by tightening the substantive controls on participants’ conduct, but this is unlikely to happen, given that responsible marketing comes at a significant cost to individual companies. This points to the need for some form of external pressure if the industry is to adopt a voluntary scheme that serves public rather than private interests.

5. Public health participation in industry based initiatives

Given the many failures of self-regulation, I went on to consider ways in which the RCMI and QSRI schemes might be strengthened (drawing upon the theoretical framework developed in Chapter 3). Chapter 10 explored the scope for enhancing external stakeholder participation in self-regulatory processes. Public health groups are highly active in the food regulatory space and in obesity prevention more broadly. They advocate for government regulation on advertising unhealthy food to children, develop policy proposals, research the extent and nature of food marketing, evaluate self-regulation and lay complaints about advertisements that breach the RCMI and QSRI. As such, they constitute a significant source of pressure on the industry to adopt self-regulation and to comply with voluntary standards. In addition, the RCMI and QSRI allow for direct stakeholder engagement in the scheme, via the nutrition arbiter that participates in food advertising complaints determinations and also through processes of independent review. However, I argue that these are relatively weak

forms of external influence, meaning that in practice non-industry stakeholders have had little direct influence over the operation of self-regulation.

The public health stakeholders that I interviewed acknowledged that there was potential for collaborating with the food industry in policy initiatives. Further, they saw co-regulation as a viable option for controls on food marketing, at least as an interim measure. This suggests that there is some scope for developing the RCMI and QSRI into more participatory programs. However, the ABAC illustrates the dangers of public health participation in industry-based schemes, both for the health actors involved and for the credibility of the scheme itself. Because of the significant risk of industry ‘capture’, external stakeholder engagement in private regulation offers little benefit to public health, unless it occurs within a framework of government support and oversight.

6. Government influence over industry self-regulation

The overall conclusion is that state intervention is required if the RCMI and QSRI are to operate as an effective voluntary scheme. Government and the food industry are devoting significant attention to the development of new food and nutrition policies and regulatory standards. During my period of PhD candidature, the Federal government has introduced the voluntary star scheme for front-of-pack nutrition labelling, finalised Standard 1.2.7 of the *Food Standards Code* on health and nutrition claims, together with a nutrient profiling model, and initiated development of the *National Food Plan* and *National Nutrition Policy*. It remains to be seen whether these developments in food governance also encourage greater government interest in food advertising to children, particularly given ANPHA’s proposed frameworks for monitoring the RCMI and QSRI.³ However, even without the results of further monitoring, this thesis provides sufficient evidence that self-regulation is ineffective and unlikely to further reduce children’s exposure to unhealthy food advertising. For these reasons, it is time for the government to step up on the regulation of advertising unhealthy food to children.

Government action need not imply statutory regulation, despite this being the preferred option of public health groups. A number of government initiatives, including the Food and Health Dialogue, rely upon collaboration with the food industry, discouraging the

³ Australian National Preventive Health Agency, *Draft Frameworks for Monitoring Television Marketing and Advertising to Children for Unhealthy Food and Drinks – Issues Paper* (April 2013) <<http://anpha.gov.au/internet/anpha/publishing.nsf/Content/frameworks-monitoring-unhealthy-food-drafts>>.

introduction of legislation that is unpopular with Big Food, and puts co-operative approaches at risk. Other impediments to state action include the ‘normalisation’ of the food industry and junk food consumption, combined with entrenched neo-liberal ideologies about individual choice and the desirability of streamlining regulation. Even when the government is willing to confront industry directly (as with Big Tobacco), it is likely that regulation will develop incrementally over a number of years. The UK restrictions on advertising unhealthy food illustrate how governments are more likely to build upon existing regulatory models than they are to introduce entirely new legislative measures.

7. An incremental approach to strengthening the food industry’s scheme

Given these impediments to immediate statutory regulation of food advertising, the Federal government may need to take action through novel forms of regulation that do not involve prescriptive legislation, but which still recognise the state’s leadership role in public health. The RCMI and QSRI could be strengthened by the use of regulatory ‘scaffolds’,⁴ where the government determines key substantive elements of voluntary codes, and structures the involvement of different stakeholders in regulatory processes, while still allowing significant industry governance of code content and the standards that apply to code signatories. Through co-regulation the government would set the objectives for the RCMI and QSRI, define their key terms and create uniform nutrition standards for the scheme. It would also provide for independent administration, monitoring, enforcement and review of self-regulation, through processes that facilitate participation by a wide range of stakeholders.

In accordance with responsive regulation, and as recommended by the National Preventive Health Taskforce, I argue that the government should take further steps to restrict food advertising to children. This could involve progressively strengthening the scheme’s requirements, as well as escalation up a pyramid of increasing severe regulatory options. Specifically, in Chapter 11 I proposed that the government finalise the monitoring frameworks for the codes and the nutrient profiling model to be used in determining which foods and beverages are appropriate for advertising to children. The government should also consider a co-regulatory scheme, using legislation to require registration of the codes, as well as to specify the objectives to be addressed in food industry self-regulation, define terms in the initiatives, and establish independent governance processes for the schemes. Co-

⁴ Roger S Magnusson and Belinda H Reeve, 'Regulation and the Prevention Agenda' (2013) 199(2) *Medical Journal of Australia* 89.

regulation, including registration of industry codes, occurs in other sectors, including broadcast advertising regulation, setting a precedent for this kind of regulatory arrangement. A final step is that government must clearly communicate to industry that if an improved voluntary scheme fails to reduce children's exposure to unhealthy food advertising, it is willing to introduce more coercive forms of regulation such as statutory bans on advertising unhealthy food during children's peak viewing times or in media with large child audiences.

In making this argument, I endorse the use of regulation that involves some degree of collaboration with the food industry or voluntary action on its part. Yet there are strong arguments that Big Food and Big Alcohol should not play any role in public health initiatives and that statutory regulation should be the main (or only) approach. A responsive, staged or incremental approach may not be as effective as statutory bans on advertising in the short term, but it is more politically feasible in conditions of regulatory capitalism. It adds value to public health by proposing new ways of regulating the powerful, multinational industries that exert a substantial influence on consumer choice, and ultimately on public health. It recognises the constraints on state action, but also the potential for other actors (such as public health organisations) to play a larger part in public health governance, without leaving public health initiatives in the hands of industry. Rather, voluntary action must take place in the context of government monitoring and oversight, combined with the potential for regulatory escalation. This includes the possibility of co-regulation when the industry does not voluntarily 'get its house in order', followed by the introduction of more coercive regulatory options. Public health needs strong government leadership, particularly when faced with challenges that require new forms of law, regulation and governance.

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The Responsible Children's Marketing Initiative of the Australian Food and Beverage Industry



Introduction

The Australian Food and Beverage Industry has developed this initiative to demonstrate its commitment to responsible marketing of foods and beverages to children.

The goal is to ensure that a high level of social responsibility in marketing communication and marketing food and beverage products in Australia is maintained.

This initiative will provide confidence in the responsible marketing practices via clear expectations of the form, spirit and context, and a transparent process for monitoring and review of practices. The aim is to provide a framework for food and beverage companies to help promote healthy dietary choices and lifestyles to Australian children.

This Initiative has been developed in collaboration with the AANA as part of the system of advertising and marketing self-regulation in Australia. Signatories to this initiative must also abide by:

- The AANA Code for Advertising & Marketing Communications to Children
- The AANA Food & Beverages Advertising & Marketing Communications Code
- The AANA Code of Ethics

This document outlines the minimum commitments required by signatories. Companies may choose to adopt additional commitments.

Scope

The scope of this initiative is based on the definitions of **Advertising or Marketing Communications to Children** and **Media**.

Advertising or Marketing Communications to Children is defined by the ANNA Code for Advertising and Marketing Communications to Children and means advertising or marketing communications which, having regard to the theme, visuals and language used, are directed primarily to Children and are for Product.

Media means television, radio, print, cinema and third-party internet sites where the audience is predominantly children and/or having regard to the theme, visuals, and language used are directed primarily to children. 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.

Further definitions are provided in Appendix 1.

An indicative television program list is provided in Appendix II.

Core Principles

Companies participating in this initiative will publicly commit to marketing communications to children under 12, only when it will further the goal of promoting healthy dietary choices and healthy lifestyles.

Each participant will develop an individual company action plan that outlines how they will meet the following core principles:

Advertising Messaging

Participants will not advertise food and beverage products to children under 12 in media unless:

1. those products represent healthy dietary choices, consistent with established scientific or Australian government standards

And

2. the advertising and/or marketing communication activities reference, or are in the context of, a healthy lifestyle, designed to appeal to the intended audience through messaging that encourages:
 - good dietary habits, consistent with established scientific or government criteria
 - physical activity.

Use of Popular Personalities and Characters

Participants will not use popular personalities, program characters or licensed characters in advertising primarily directed to children under 12 unless such advertising complies with the messaging options set out above. This is in addition to requirements under the Children's Television Standards 2009 covering C and P periods (CTS section 35).

Product Placement

Participants will commit to not paying for or actively seeking to place their food or beverage products in the program/editorial content of any medium primarily directed to children under 12 for the purpose of promoting the sale of those products unless those products are consistent with healthy dietary choices under #1 above.

Use of Products in Interactive Games

Participants will commit that, in any interactive game primarily directed to children under 12 where the company's food or beverage products are incorporated into the game, the interactive game must incorporate or be consistent with healthy dietary choices under #1 above and healthy lifestyle messaging under #2 above.

Advertising in Schools

Participants will refrain from product-related communications in primary schools, except where specifically requested by, or agreed with, the school administration for educational or informational purposes, or related to healthy lifestyle activities under the supervision of the school administration or appropriate adults.

Use of Premium Offers

Participants will commit to not advertising premium offers unless the reference to the premium is merely incidental to the product being advertised in accordance with the AANA codes and the Children's Television Standards 2009 (CTS Section 33).

Individual Company Action Plans

Companies will sign up to this initiative as a minimum commitment and will develop and publish individual *Company Action Plans* that outline their specific commitments including individual nutritional standards if applicable in order to meet the core principles of this initiative.

Because companies and their product lines vary, the way companies comply with this framework will differ. However, all commitments will be consistent with the core principles outlined in this initiative.

This initiative outlines the minimum commitments required by signatories. Companies may choose to go further if they wish.

Complaints

AFGC and AANA have formulated a transparent public complaints system, managed by the Advertising Standards Bureau.

Sanctions may be imposed on participants who fail to meet their obligations under the terms of this initiative.

Compliance monitoring

Companies are required to report on their marketing communication activities to children on an annual basis. Key criteria have been established to assess how companies' activities meet the core principles outlined in this initiative.

AFGC will be responsible for coordinating the monitoring of company activities on an annual basis to confirm compliance, with resultant reports being made publically available.

Appendix I - Definitions

In this Initiative:

Marketing Communications means

- a. matter which is published or broadcast using any medium in all of Australia or in a substantial section of Australia for payment or other valuable consideration and which draws the attention of the public or a segment of it, to a product, service, person, organisation, or line of conduct in a manner calculated to promote or oppose directly or indirectly that product, service, person, organisation or line of conduct;
- b. any activity which is undertaken by or on behalf of an advertiser or marketer for payment or other valuable consideration and which draws the attention of the public or a segment of it to a product, service, person, organisation or line of conduct in a manner calculated to promote or oppose directly or indirectly the product, service, person, organisation or line of conduct, but does not include Excluded Advertising or Marketing Communications.

Excluded Marketing Communications means labels or packaging for products.

Advertising or Marketing Communications to Children is defined by the AANA Code for Advertising and Marketing Communications to Children and means advertising or marketing communications which, having regard to the theme, visuals, and language used, are directed primarily to children and are for product.

Media means television, radio, print, cinema and third-party internet sites where the audience is predominantly children and/or having regard to the theme, visuals, and language used are directed primarily to children.

Children means persons under 12 years of age.

Popular Personalities and Characters means:

- a personality or character from a C program or P program
- a popular program or movie character
- a non-proprietary cartoon, animated or computer generated character
- a popular personality.

Premium means anything offered free or at a reduced price and which is conditional upon the purchase of a children's food or beverage product.

Product is defined by the AANA Code for Advertising and Marketing Communications to Children and means goods, services and/or facilities which are targeted toward and have principal appeal to Children. In the case of the Responsible Children's Marketing Initiative, the Product is contained to food and beverages.

Appendix II - Indicative Television Program List

Under the Responsible Children’s Marketing Initiative, participants will not advertise food and beverage products to children under 12 in media unless it meets the core principles in relation to advertising messaging.

The list in Table 1 has been provided to illustrate the types of television programs covered by the initiative. This list 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 as being designed for children (through the themes, visuals and language used). The list in Table 2 outlines programs that are not covered by the initiative.

Note: these are indicative lists and will be updated from time to time to reflect current programming. The Advertising Standards Board makes the final determination of programs covered by the Responsible Children’s Marketing Initiative.

Table 1: Programs covered by the RCMi

Action Man A.T.O.M.	It's Academic	SpongeBob SquarePants
Alvin and the Chipmunks	Kamen Rider Dragon Knight	Spy Kids
Animalia	Kid's WB on Nine	Sumo Mouse
Bakugan	Kidspeak	Tamagotchi!
Ben 10: Alien Force	Kim Possible	The Ant Bully
Blinky Bill	K9	The Batman
Bubble Town Club	Lab Rats Challenge	The Book Place
Camp Lazlo	Legend of Enyo	The Fairies
Cats & Dogs	Legion of Superheroes	The Flintstones
Chaotic	Life and Times of Juniper Lee	The Jetsons
Chowder	Looney Tunes	The Marvellous Misadventures of Flapjack
Class of 3000	Maddigan's Quest	The Perils of Penelope Pitstop
Codename: Kids Next Door	Magical Tales	The Replacements
Count Duckula	Marine Boy	The Saddle Club
Dangermouse	Mickey Mouse Clubhouse	The Shak
Dennis & Gnasher	Mortified	The Sleepover Club
Dex Hamilton	My Friends Tigger and Pooh	The Wind in the Willows
Digimon Data Squad	My Gym Partner is a Monkey	Thunderbirds
Dive Olly Dive	Oggy and the Cockroaches	Toasted TV
Dora The Explorer	Out of Jimmy's Head	Tom & Jerry
Erky Perky	Phineas and Ferb	Top Cat
Foster's Home for Imaginary	Power Rangers	Totally Wild
Friends	Puzzle Play	Toybox
Flipper	Ruby Gloom	Trapped
Go, Diego Go	Rugrats Go Wild!	Treasure Island
Go Go Stop	Saturday Disney	Wacky Races
G2G: Got to Go	Scooby-Doo (and Shaggy)	Wipeout
Handy Manny	Scope	Wormwood
Hannah Montana	Sea Princesses	Yin Yang Yo!
Hi-5	Spectacular Spiderman	Yu Gi Oh! 5 Dragons
H2O - Just Add Water	Spit it Out	

Table 2: Programs not covered by the RCMI

The Simpsons Wipeout The X Factor Malcolm in the Middle Sunrise Today Knight Rider Wagon Train The Virginian Home and Away Neighbours The Zoo The Nanny Friends I Dream of Jeannie Bewitched	The Morning Show Get Smart Ready Steady Cook Masterchef Here's Lucy Deal or No Deal The A-Team Monster Garage Minute to Win It That '70s Show How I Met Your Mother Two and a Half Men The Big Bang Theory Top Gear Seinfeld
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AUSTRALIAN QUICK SERVICE RESTAURANT INDUSTRY INITIATIVE FOR RESPONSIBLE ADVERTISING AND MARKETING TO CHILDREN

1. STATEMENT OF INTENT

The Australian Quick Service Restaurant Industry has developed this initiative to demonstrate its commitment to responsible advertising and marketing of food and/or beverages to children.

The Initiative provides a common framework for quick service restaurant companies to ensure that only food and beverages that represent healthier choices are promoted directly to children and to ensure parents or guardians can make informed product choices for their children.

This Initiative has been developed in collaboration with the AANA as part of the system of advertising and marketing self-regulation in Australia.

Participants must also abide by:

- The AANA Code for Advertising & Marketing Communications to Children
- The AANA Food & Beverages Advertising & Marketing Communications Code
- The AANA Code of Ethics

This initiative will provide confidence in the responsible marketing practices via clear expectations of the form, spirit and context, and a transparent process for monitoring and review of practices.

Definitions are set out in Clause 7 and Appendix 1

2. PARTICIPANTS

Participants to this Initiative include:

McDonald's
KFC
Pizza Hut
Hungry Jack's
Oporto
Red Rooster
Chicken Treat

3. COMMENCEMENT

This Initiative commences on 1 August 2009.

4. CORE PRINCIPLES

4.1 Advertising and Marketing Messaging

Advertising or Marketing Communications to Children for food and/or beverages must:

(a) Represent healthier choices, as determined by a defined set of Nutrition Criteria for assessing children's meals (see Appendix 1); and/or

(b) Represent a healthy lifestyle, designed to appeal to the intended audience through messaging that encourages:

- (i) healthier choices, as determined by a defined set of Nutrition Criteria for assessing children's meals (see Appendix 1); and
- (ii) physical activity.

4.2 Popular Personalities and Licensed Characters

Popular Personalities or Licensed Characters must not be used in Advertising or Marketing Communications to Children for food and/or beverage products, unless such Advertising or Marketing Communications complies with the messaging options set out in Article 4.1 and the specific requirements of Section 22 (Promotions and Endorsements by Program Characters) of the Children's Television Standards 2005.

4.3 Product Placement

Participants must not pay for the placement of, or actively seek to place, food and/or beverage products in the program or editorial content of any Medium directed primarily to Children unless such food and/or beverage products are consistent with Article 4.1(a).

4.4 Use of Products in Interactive Games

Each Participant must ensure, as far as possible, that any interactive game which incorporates food and/or beverage products sold at that Participant's store or outlet and is primarily directed to Children, is consistent with Article 4.1(b).

4.5 Advertising in Schools

Participants must not engage in any product-related communications in Australian schools, except where specifically requested by, or agreed with, the school administration, or related to healthy lifestyle activities under the supervision of the school administration or appropriate adults.

4.6 Use of Premium Offers

Participants must not advertise Premium offers in any Medium directed primarily to Children unless the reference to the Premium is merely incidental to the food and/or beverage product being advertised in accordance with the AANA Codes and Section 20 (Disclaimers and Premium Offers) of the *Childrens Television Standards 2005*.

4.7 On-Pack Nutrition Labelling

Nutritional profile information must be provided on packaging wherever possible, in respect of those food products usually contained in such packaging to assist parents and guardians to make informed food choices for their children.

4.8 Availability of Nutrition Information

Nutritional profile information must also be available on company websites or upon request, in respect of all food and beverage products to assist parents and guardians to make informed food choices for their children.

5. INDIVIDUAL COMPANY ACTION PLANS

5.1 Participants must develop and publish individual 'Company Action Plans' for the purposes of communicating how they will each meet the requirements of this Initiative and the anticipated timeframe for these required actions.

5.2 All commitments must be consistent with the core principles outlined in this Initiative.

6. COMPLIANCE, COMPLAINTS, AND MONITORING

6.1 Key Criteria for Meeting Core Principles

Participants acknowledge that key criteria will be established in consultation with nutritional experts and the AANA to assess whether Signatories' Advertising or Marketing Communications to Children for food and/or beverage products meet the core principles outlined in this document.

6.2 Compliance and Complaints

Participants acknowledge that:

- (a) they will work with the AANA to formulate a public compliance program, including the administration of a public complaints system in relation to this Initiative via the Advertising Standards Bureau which will be determined by the Advertising Standards Board, and each Participant will be subject to such compliance and public complaints process;
- (b) any compliance program developed will be made publicly available;
- (c) the compliance program developed will periodically be reviewed, in consultation with the participants, in respect of procedures and the overall impact of this Initiative. The first such review will be started on or around the first anniversary from the implementation of this compliance program.

6.3 Monitoring Implementation of Initiative

On and from the commencement of this Initiative, the Participants will appoint an independent individual or organisation to monitor Participants' Advertising or Marketing Communications to Children for food and/or beverage products for a period of 12 months and will publish a publicly available report of its findings. Such monitoring and reporting will be repeated periodically. The final report will focus on industry response and determine the nature of improvements in performance and will report generally on the findings.

7. DEFINITIONS

In this Initiative, unless the context otherwise requires:

Advertising or Marketing Communications means any matter generated by a Participant which is published or broadcast using any Medium for payment or other valuable consideration and which draws the attention of the public or a segment to it, to a product, service, person, organisation, or line of conduct in a manner calculated to promote or oppose directly or indirectly that product, service, person, organisation or line of conduct but does not include in-store point of sale material, labels, or packaging of products.

Advertising or Marketing Communications to Children means 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.

Child means a person under 14 years of age.

Children means persons under 14 years of age.

Children's Television Standards 2005 means the Australian Communications and Media Authority *Children's Television Standards 2005*.

Participants means:

- (a) McDonald's Australia,
- (b) Yum Brands Australia,
- (c) Hungry Jack's Australia;
- (d) Quick Service Restaurant Holdings Pty Ltd; and
- (e) any other Quick Service Restaurant who agrees to be bound by the terms of the Initiative after its Commencement.

Medium means television, radio, newspapers, magazines, outdoor billboards and posters, emails, interactive games, cinema and internet sites.

Popular Personalities and Licensed Characters means a personality or character from a C program or P program, a popular program or movie character, a non-proprietary cartoon, animated or computer generated character

Premium means anything offered free or at a reduced price and which is conditional upon the purchase of regular Children's Food or Beverage Product.

8. IMPLEMENTATION

- (a) Agreement to this initiative to be finalised by 25 June 2009.
- (b) Company Action Plans will be required to be submitted on company website by 1 August 2009.
- (c) The Participants and the AANA undertake to review this initiative in 2010.

APPENDIX 1 –NUTRITION CRITERIA FOR ASSESSING CHILDREN’S MEALS

The nutrition criteria for assessing children’s meals, according to the Australian Quick Service Restaurant Industry Initiative for Responsible Advertising and Marketing to Children, are as follows:

1. Meal composition

- a. The meal must be comprised of at least a main and a beverage.
- b. The meal should reflect general principles of healthy eating as defined by credible nutrition authorities.

2. Energy

- a. The meal must satisfy an energy criteria based on the Nutrient Reference Values¹ for children of different age groups. The maximum energy limits for each target age group are as follows:
 - i. 4-8 years - 2080 kJ per meal
 - ii. 9-13 years - 2770 kJ per meal

3. Nutrients of public health concern

- a. The meal must not exceed maximum limits as follows:
 - i. Saturated fat - 0.4g per 100kJ;
 - ii. Sugar - 1.8g per 100kJ; and
 - iii. Sodium - 650mg per serve.

- b. Overall, the average level of saturated fat, sugar and sodium in the meal will be less than what children are currently eating (based on the Children’s Survey²).

The nutrition criteria for assessing children’s meals have been developed by a team of Accredited Practicing Dietitians in consultation with national guidelines and authorities on children’s nutrition. These criteria will be piloted over the next 12 months and updated as required to reflect changes in nutrition science and NHMRC recommendations. Specific details on the nutrition criteria are outlined in a compliance tool provided to signatories of this Initiative.

References

1. National Health and Medical Research Council. Nutrient Reference Values for Australia and New Zealand. Canberra: Commonwealth of Australia; 2006.
2. Australian Government: Department of Health and Ageing. 2007 Australian National Children’s Nutrition and Physical Activity Survey. Canberra: Commonwealth of Australia; 2008.

The ABAC Scheme: ALCOHOL BEVERAGES ADVERTISING (AND PACKAGING) CODE

Preamble

Brewers Association of Australia and New Zealand Inc, the Distilled Spirits Industry Council of Australia Inc and the Winemakers Federation of Australia are committed to the goal that all advertisements for alcohol beverages produced for publication or broadcast in Australia other than point of sale material produced by alcohol beverage retailers, comply with the spirit and intent of this Code.

The Code is designed to ensure that alcohol advertising will be conducted in a manner which neither conflicts with nor detracts from the need for responsibility and moderation in liquor merchandising and consumption, and which does not encourage consumption by underage persons.

The conformity of an advertisement with this Code is to be assessed in terms of its probable impact upon a reasonable person within the class of persons to whom the advertisement is directed and other persons to whom the advertisement may be communicated, and taking its content as a whole.

Definitions

For the purpose of this Code –

adult means a person who is at least 18 years of age;

alcohol beverage includes any particular brand of alcohol beverage;

adolescent means a person aged 14-17 years inclusive;

Australian Alcohol Guidelines means the electronic document ‘Australian Guidelines to Reduce Health Risks from Drinking Alcohol (1-2)’ published by the National Health & Medical Research Council (“NHMRC”) as at 1st January 2010.

child means a person under 14 years of age; and

low alcohol beverage means an alcohol beverage which contains less than 3.8% alcohol/volume.

Standards to be applied

Part 1 – Standards to be applied to advertisements for alcohol beverages

Advertisements for alcohol beverages must –

- a) present a mature, balanced and responsible approach to the consumption of alcohol beverages and, accordingly –
 - i) must not encourage excessive consumption or abuse of alcohol;

- ii) must not encourage under-age drinking;
 - iii) must not promote offensive behaviour, or the excessive consumption, misuse or abuse of alcohol beverages;
 - iv) must only depict the responsible and moderate consumption of alcohol beverages;
- b) not have a strong or evident appeal to children or adolescents and, accordingly –
- i) adults appearing in advertisements must be over 25 years of age and be clearly depicted as adults;
 - ii) children and adolescents may only appear in advertisements in natural situations (eg family barbecue, licensed family restaurant) and where there is no implication that the depicted children and adolescents will consume or serve alcohol beverages; and
 - iii) adults under the age of 25 years may only appear as part of a natural crowd or background scene;
- c) not suggest that the consumption or presence of alcohol beverages may create or contribute to a significant change in mood or environment and, accordingly –
- i) must not depict the consumption or presence of alcohol beverages as a cause of or contributing to the achievement of personal, business, social, sporting, sexual or other success;
 - ii) if alcohol beverages are depicted as part of a celebration, must not imply or suggest that the beverage was a cause of or contributed to success or achievement; and
 - iii) must not suggest that the consumption of alcohol beverages offers any therapeutic benefit or is a necessary aid to relaxation;
- d) not depict any direct association between the consumption of alcohol beverages, other than low alcohol beverages, and the operation of a motor vehicle, boat or aircraft or the engagement in any sport (including swimming and water sports) or potentially hazardous activity and, accordingly –
- i) any depiction of the consumption of alcohol beverages in connection with the above activities must not be represented as having taken place before or during engagement of the activity in question and must in all cases portray safe practices; and
 - ii) any claim concerning safe consumption of low alcohol beverages must be demonstrably accurate;
- e) not challenge or dare people to drink or sample a particular alcohol beverage, other than low alcohol beverages, and must not contain any inducement to prefer an alcohol beverage because of its higher alcohol content; and
- f) comply with the Advertiser Code of Ethics adopted by the Australian Association of National Advertisers.
- g) not encourage consumption that is in excess of, or inconsistent with the Australian Alcohol Guidelines issued by the NHMRC.
- h) not refer to The ABAC Scheme, in whole or in part, in a manner which may bring the scheme into disrepute.

Internet Advertisements

The required standard for advertisements outlined in (1)(a) to (h) above applies to internet sites primarily intended for advertising developed by or for producers or importers of alcohol products available in Australia or that are reasonably expected to be made available in Australia, and to banner advertising of such products on third party sites.

Retail Advertisements

Advertisements which contain the name of a retailer or retailers offering alcohol beverages for sale, contain information about the price or prices at which those beverages are offered for sale, and which contain no other material relating to or concerning the attributes or virtues of alcohol beverages except –

- i) the brand name or names of alcohol beverages offered for sale;
- ii) the type and/or style of the alcohol beverages offered for sale;
- iii) a photographic or other reproduction of any container or containers (or part thereof, including any label) in which the alcohol beverages offered for sale are packaged;
- iv) the location and/or times at which the alcohol beverages are offered for sale; and
- v) such other matter as is reasonably necessary to enable potential purchasers to identify the retailer or retailers on whose behalf the advertisement is published,

must comply with the spirit and intent of the Code but are not subject to any process of prior clearance.

Promotion of alcohol at events

Alcohol beverage companies play a valuable role in supporting many community events and activities. It is acknowledged that they have the right to promote their products at events together with the right to promote their association with events and event participation. However, combined with these rights comes a range of responsibilities. Alcohol beverage companies do not seek to promote their products at events which are designed to clearly target people under the legal drinking age.

This protocol commits participating alcohol beverage companies to endeavour to ensure that:

- All promotional advertising in support of events does not clearly target underage persons and as such is consistent with the ABAC standard; and
- Alcohol beverages served at such events are served in keeping with guidelines, and where applicable legal requirements, for responsible serving of alcohol (which preclude the serving of alcohol to underage persons); and
- Promotional staff at events do not promote consumption patterns that are inconsistent with responsible consumption, as defined in the NHMRC Guidelines; and
- Promotional staff do not misstate the nature or alcohol content of a product; and
- Promotional staff at events are of legal drinking age; and

- Promotional materials distributed at events do not clearly target underage persons; and
- Promotional materials given away at or in association with events do not connect the consumption of alcohol with the achievement of sexual success; and
- Promotional materials given away at or in association with events do not link the consumption of alcohol with sporting, financial, professional or personal success; and
- Promotional materials given away at events do not encourage consumption patterns that are inconsistent with responsible consumption, as defined in the NHMRC Guidelines; and
- A condition of entry into giveaways promoted by alcohol companies at or in association with events is that participants must be over the legal drinking age; and Prizes given away in promotions associated with alcohol beverage companies will only be awarded to winners who are over the legal drinking age.

Third Parties

At many events alcohol companies limit their promotional commitments to specified activities. This protocol only applies to such conduct, activities or materials associated with events that are also associated with alcohol beverage companies.

Alcohol beverage companies will use every reasonable endeavour to ensure that where other parties control and/or undertake events, including activities surrounding those events, they comply with this protocol. However non-compliance by third parties will not place alcohol beverage companies in breach of this protocol.

Public Education

This protocol does not apply to or seek to restrict alcohol beverage companies from being associated with conduct, activity or materials that educate the public, including underage persons, about the consequences of alcohol consumption and the possible consequences of excessive or underage consumption.

Part 2 – Standards to be applied to the naming and packaging of alcohol beverages

1. The naming or packaging of alcohol beverages (which is also referred to within these standards as “product material”) must:

- a) present a mature, balanced and responsible approach to the consumption of alcohol beverages and, accordingly –
 - i) must not encourage excessive consumption or abuse of alcohol;
 - ii) must not encourage under-age drinking;
 - iii) must not promote offensive behaviour, or the excessive consumption, misuse or abuse of alcohol beverages;
 - iv) must only depict the responsible and moderate consumption of alcohol beverages;
- b) not have a strong or evident appeal to children or adolescents and, accordingly –
 - i) adults appearing in product material must be over 25 years of age and be clearly depicted as adults;

- ii) children and adolescents may only appear in product material in natural situations (e.g. family barbecue, licensed family restaurant) and where there is no implication that the depicted children and adolescents will consume or serve alcohol beverages; and
 - iii) adults under the age of 25 years may only appear as part of a natural crowd or background scene;
- c) not suggest that the consumption or presence of alcohol beverages may create or contribute to a significant change in mood or environment and, accordingly –
 - i) must not depict the consumption or presence of alcohol beverages as a cause of or contributing to the achievement of personal, business, social, sporting, sexual or other success;
 - ii) if alcohol beverages are depicted as part of a celebration, must not imply or suggest that the beverage was a cause of or contributed to success or achievement; and
 - iii) must not suggest that the consumption of alcohol beverages offers any therapeutic benefit or is a necessary aid to relaxation;
- d) not depict any direct association between the consumption of alcohol beverages, other than low alcohol beverages, and the operation of a motor vehicle, boat or aircraft or the engagement in any sport (including swimming and water sports) or potentially hazardous activity and, accordingly –
 - i) any depiction of the consumption of alcohol beverages in connection with the above activities must not be represented as having taken place before or during engagement of the activity in question and must in all cases portray safe practices; and
 - ii) any claim concerning safe consumption of low alcohol beverages must be demonstrably accurate;
- e) not challenge or dare people to drink or sample a particular alcohol beverage, other than low alcohol beverages, and must not contain any inducement to prefer an alcohol beverage because of its higher alcohol content; and
- f) not encourage consumption that is in excess of, or inconsistent with the Australian Alcohol Guidelines issued by the NHMRC.
- g) not refer to The ABAC Scheme, in whole or in part, in a manner which may bring the scheme into disrepute.

2. These standards, (Part 2 (1) (a)-(g)), apply to the naming and packaging of all alcohol beverages supplied in Australia, with the exception of the name of any product or a trademark which the supplier can demonstrate, to the satisfaction of the Adjudication Panel, had been supplied for bona fide retail sale in the ordinary course of business in a State or Territory of Australia prior to 31 October 2009.

Ref: IM/PE

17 June 2011

Professor Roger Magnusson
Sydney Law School – F10
The University of Sydney
Email: roger.magnusson@sydney.edu.au

Dear Professor Magnusson

Thank you for your correspondence dated 15 June 2011 addressing comments made to you by the Human Research Ethics Committee (HREC). The Executive of the HREC, on 17 June 2011, considered this information and approved the protocol entitled “**Investigating self-regulation of food and beverage advertising to children**”.

Details of the approval are as follows:

Protocol No.: 13870
Approval Period: June 2011 to June 2012
Authorised Personnel: Professor Roger Magnusson
Ms Belinda Reeve

Documents Approved:

Participant Information Statement Version 1 19 May 2011
Participant Consent Form Version 2 15 June 2011
Letter of Invitation Version 1
Interview Schedule – Industry Body Version 1 19 May 2011
Interview Schedule – Company Version 1 19 May 2011

The HREC is a fully constituted Ethics Committee in accordance with the National Statement on Ethical Conduct in Research Involving Humans-March 2007 under Section 5.1.29.

The approval of this project is conditional upon your continuing compliance with the National Statement on Ethical Conduct in Research Involving Humans. A report on this research must be submitted every 12 months from the date of the approval or on completion of the project, whichever occurs first. Failure to submit reports will result in withdrawal of consent for the project to proceed. Your report is due by **30 June 2012**.

Chief Investigator / Supervisor’s responsibilities to ensure that:

1. All serious and unexpected adverse events should be reported to the HREC within 72 hours for clinical trials/interventional research.
2. All unforeseen events that might affect continued ethical acceptability of the project should be reported to the HREC as soon as possible.
3. Any changes to the protocol must be approved by the HREC before the research project can proceed.

4. All research participants are to be provided with a Participant Information Statement and Consent Form, unless otherwise agreed by the Committee. The following statement must appear on the bottom of the Participant Information Statement: *Any person with concerns or complaints about the conduct of a research study can contact the Manager, Human Ethics, University of Sydney on +61 2 8627 8176 (Telephone); + 61 2 8627 8177 (Facsimile) or ro.humanethics@sydney.edu.au (Email).*
5. You must retain copies of all signed Consent Forms and provide these to the HREC on request.
6. It is your responsibility to provide a copy of this letter to any internal/external granting agencies if requested.
7. The HREC approval is valid for four (4) years from the Approval Period stated in this letter. Investigators are requested to submit a progress report annually.
8. A report and a copy of any published material should be provided at the completion of the Project.

Please do not hesitate to contact Research Integrity (Human Ethics) should you require further information or clarification.

Yours sincerely



Associate Professor Ian Maxwell
Chair
Human Research Ethics Committee

Copy: Belinda Reeve belinda.reeve@sydney.edu.au