

FOOD ADVERTISING AND OBESITY IN AUSTRALIA: TO WHAT EXTENT CAN SELF-REGULATION PROTECT THE INTERESTS OF CHILDREN?

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In 2006, the Australian Association of National Advertisers implemented the self-regulatory Food and Beverages Advertising and Marketing Communications Code in response to public concern about the influence of 'junk food' advertising on children's obesity levels and pressure for more restrictive regulation of this advertising. The purpose of this article is to evaluate the efficacy of the Code and the capacity of self-regulation to protect children's interests in relation to food advertising. The article analyses the Code with regard to characteristics and conditions considered necessary for, or typical of, effective self-regulation. The article identifies a number of deficiencies in the Code and self-regulatory scheme, and concludes that self-regulation is unsuitable for protecting children from harmful effects of food advertising, due mainly to advertisers' overriding commercial interest in using advertising practices that are effective for encouraging children to consume unhealthy food.

I INTRODUCTION

In Australia and internationally, the issue of food advertising¹ to children has received much attention in the context of public concern about rapidly increasing rates of childhood overweight and obesity. In Australia, health and consumer groups have called for governments to ban this advertising as part of a strategy to combat weight gain and obesity in

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1 In this paper, the word 'food' is used to refer to food and beverages, and the phrase 'food advertising' is used to refer to all forms of commercial promotion of food or non-alcoholic beverages.

children.² However, the link between food advertising and obesity in children, and the need for further restriction of this advertising, is fiercely contested. On one side of the debate, health and consumer groups assert that food advertising influences children to prefer, consume and pester parents for advertised products, and that effective regulation of this advertising is one of a range of measures required to effectively address the obesity problem.³ On the other side of the debate, food advertisers argue that evidence of a causal link between food advertising and obesity is inconclusive, and existing advertising regulations are sufficient.⁴

The Australian Association of National Advertisers ('AANA') – the industry body representing advertisers in Australia – denies any link between food advertising and obesity in children, and disputes health experts' descriptions of the extent and seriousness of the childhood obesity problem.⁵ Despite this, in 2006 the AANA released the self-regulatory Food and Beverages Advertising and Marketing Communications Code ('Food Code'), which includes specific provisions on food advertising directed to children. According to the AANA, the Food Code was developed to address concerns about advertising and obesity,⁶ and 'avoid excessive regulation in the field of advertising and commercial communications'.⁷

The Food Code was implemented in November 2006 as part of the AANA's national self-regulatory scheme, and the Advertising Standards Board recently

- 2 See, eg, Choice (formerly Australian Consumers' Association), 'Food Marketing: Playing with Children's Health' (Press Release, 13 June 2006) <<http://www.choice.com.au/viewPressRelease.aspx?id=105301&catId=100572&tid=100010&p=1>> at 23 April 2009; Obesity Policy Coalition, 'OPC Calls for Government Regulation of Food Marketing to Children' (Press Release, 24 August 2007) <<http://www.opc.org.au/article.asp?ContentID=mr20070824>> at 23 April 2009; Coalition on Food Advertising to Children, *Children's Health or Corporate Wealth? The Case for Banning Television Food Advertising to Children* (2007) <http://www.cfac.net.au/downloads/briefing_paper.pdf> at 23 April 2009; Maxine Firth, 'Push for Radio and TV Ban on Junk Food Ads', *The Age* (Online), 16 March 2008 <<http://www.theage.com.au/news/tv--radio/push-for-radio-and-tv-ban-on-junkfoodads/2008/03/15/1205472163993.html>> at 23 April 2009; Australian Associated Press, 'Tax Junk, Subsidise Fruit: AMA', *The Australian* (Online), 4 May 2008 <<http://www.theaustralian.news.com.au/story/0,25197,23643179-2702,00.html>> at 23 April 2009.
- 3 See, eg, Choice, *Submission to the Australian and Media Authority on the Children's Television Standards Review* (2007) <http://www.acma.gov.au/webwr/_assets/main/lib310132/36_choice.pdf> at 23 April 2009.
- 4 See, eg, *Oral Evidence to Social Development Committee*, Hansard, Adelaide, 30 October 2006, 200 (Mr Colin Segelov); Australian Association of National Advertisers ('AANA'), *Submission to the Australian and Media Authority on the Children's Television Standards Review* (2007) Australian Communications and Media Authority <http://www.acma.gov.au/webwr/_assets/main/lib310132/43_aust_assoc_of_national_advertisers.pdf> at 23 April 2009; Australian Food and Grocery Council, *Submission to the Australian and Media Authority in Response to the Children's Television Standards Review – Issues Paper* (2007) Australian Communications and Media Authority <http://www.acma.gov.au/webwr/_assets/main/lib310132/55_aust_food_and_grocery_cncl.pdf> at 23 April 2009; Free TV Australia Ltd, *Submission by Free TV Australia Limited* (2007) Australian Communications and Media Authority <http://www.acma.gov.au/webwr/_assets/main/lib310132/54_freetyv_australia.pdf> at 23 April 2009.
- 5 AANA, *Submission to the Australian and Media Authority on the Children's Television Standards Review*, above n 4.
- 6 Segelov, above n 4.
- 7 AANA, *Postscript to Original Version of the AANA Food and Beverages Marketing Communications Code 2006* (2006) 6 (copy on file with the author). The postscript is not attached to the current version of the *AANA Food and Beverages Advertising and Marketing Communications Code* (2008) Australian Association of National Advertisers <http://www.aana.com.au/food_beverages_code.html> at 23 April 2009.

began adjudicating complaints under the Code. The AANA also recently released a revised Code for Advertising and Marketing Communications to Children ('Children's Code'), after engaging public relations consultants to undertake an 'external review' of the previous Code. The AANA has claimed, among other things, that the revised Children's Code 'will help ensure that advertising and marketing communications to children meet the expectations of the Australian community'.⁸ Food advertising to children was not addressed in the Children's Code revisions, but the AANA announced that its major food and beverage members:

are working on an initiative directly relating to food & beverage advertising targeted at children, which, if adopted, will be reflected in an amended Food & Beverages Advertising & Marketing Communications Code.⁹

The Australian Communications and Media Authority ('ACMA') is currently reviewing the Children's Television Standards, which regulate the broadcast of advertising on children's free-to-air television, and has proposed several options to address food advertising to children, including requiring industry to monitor and report on the outcomes of the Food Code.¹⁰ Advertisers and broadcasters argue that the Food Code obviates any need for the Standards to impose specific restrictions on food advertising to children.¹¹

It is therefore timely to consider the extent to which self-regulation can, and the current Food Code does, afford adequate protection to children from adverse consequences of food advertising. To this end, this paper evaluates the efficacy of the Food Code for protecting children's interests by reference to characteristics considered necessary for effective self-regulation, and considers whether self-regulation is capable of protecting children from the negative influence of food advertising.

II THE NEGATIVE INFLUENCE OF FOOD ADVERTISING ON CHILDREN AND THE NEED FOR INTERVENTION

Food advertising pervades children's lives with unprecedented intensity and frequency; it reaches children through television, magazines, outdoor media, in-store promotions, and sponsorship of schools and children's sport.¹² Increasingly,

8 AANA, 'Major Changes to Advertising to Children Code' (Press Release, 16 April 2008) 2.

9 Ibid.

10 Australian Communications and Media Authority, *Children's Television Standards 2005*, Report of the Review (2008) <http://www.acma.gov.au/webwr/_assets/main/lib310132/cts_report_of_the_review.pdf> at 23 April 2009. The Australian Communications and Media Authority has released a draft of the revised *Children's Television Standards 2008* for public comment on 27 August 2008.

11 See Submissions from the AANA, above n 4; Australian Food and Grocery Council, above n 4; Free TV Australia Ltd, above n 4.

12 Corinna Hawkes, 'Self-regulation of Food Advertising: What It Can, Could and Cannot Do to Discourage Unhealthy Eating Habits among Children' (2005) 30 *British Nutrition Foundation* 374, 374; Sandra Jones et al, *Food Marketing to Children in Australia* (2007) The Cancer Council Australia <<http://www.cancer.org.au/File/PolicyPublications/FoodMarketingtoChildreninAustralia.pdf>> at 23 April 2009.

food companies use 'new media' to directly target children, for example, children's websites, internet games, email and SMS messaging.¹³ Australia has one of the highest rates of television food advertising aimed at children in the developed world,¹⁴ and most food advertising directed to children is for unhealthy food, particularly fast food and confectionery.¹⁵ Consequently, food advertising has been implicated in the rising levels of overweight and obesity in Australian children.

Food advertisers contest the existence of any link between food advertising and childhood obesity. However, comprehensive literature reviews have concluded that food advertising influences children's food preferences, purchase requests and consumption,¹⁶ resulting in increasing consensus among experts, including the World Health Organization, that food advertising contributes to poor diets, weight gain and obesity in children.¹⁷ As Livingstone recently concluded:

Nearly all research published in the past few years supports the hypothesis that food promotion, especially television advertising, contributes to the unhealthy food preferences, poor diet, and consequently, growing obesity among children in Western societies.¹⁸

Overweight and obesity in Australian children has become a critical public health problem. It is estimated that up to 25 per cent of Australian children are overweight or obese,¹⁹ and that this will increase to 60 per cent in 30 years time unless effective prevention strategies are implemented.²⁰ Being overweight or obese increases a child's risk of suffering from serious health problems, such as cardiovascular disease, high blood pressure, Type II diabetes, asthma,²¹ as well as

13 Jones et al, above n 12.

14 Sue Dibb et al, *A Spoonful of Sugar: Television Food Advertising Aimed at Children: An International Comparative Survey* (1996).

15 See Choice, *Food Marketing: Child's Play* (2006) Choice <<http://www.choice.com.au/viewArticle.aspx?id=105275&catId=100288&tid=100008&p=1&title=Food+marketing%3a+child%27s+play%3f>> at 23 April 2009; Jones et al, above n 12.

16 Gerard Hastings et al, *The Extent, Nature and Effects of Food Promotion to Children: A Review of the Evidence* (2006) World Health Organization <http://www.who.int/dietphysicalactivity/publications/Hastings_paper_marketing.pdf> at 23 April 2009; Sonia Livingstone, *New Research on Advertising Foods to Children: An Updated Review of the Literature* (2006) Ofcom <<http://www.ofcom.org.uk/consult/condocs/foodads/foodadsprint/annex9.pdf>> at 23 April 2009; Michael McGinnis, Jennifer Gootman and Vivica Kraak (eds), *Food Marketing to Children and Youth: Threat or Opportunity?* (2005).

17 World Health Organization, *Diet, Nutrition and the Prevention of Chronic Diseases*, WHO Technical Report Series No 916 (2003) <<http://www.who.int/dietphysicalactivity/publications/trs916/en/>> at 23 April 2009; Gerard Hastings et al, *Review of Research on the Effects of Food Promotion to Children*, Final Report (2003) United Kingdom Food Standards Agency <<http://www.food.gov.uk/multimedia/pdfs/foodpromotiontochildren1.pdf>> at 23 April 2009; McGinnis, Gootman and Kraak, above n 16.

18 Livingstone, above n 16, 11.

19 Michael Booth et al, 'The Epidemiology of Overweight and Obesity among Australian Children and Adolescents 1995-1997' (2001) 25 *Australian and New Zealand Journal of Public Health* 162.

20 Kevin Norton et al, 'Descriptive Epidemiology of Childhood Overweight and Obesity in Australia: 1901-2003' (2006) 1 *International Journal of Pediatric Obesity* 232, 237.

21 World Health Organization, *Obesity: Preventing and Managing the Global Epidemic*, WHO Technical Report Series No 894 (2000).

psychosocial problems, including poor self-esteem, anxiety and depression.²² In addition, obese children are at increased risk of becoming obese adults.²³

Children are recognised to be a vulnerable audience in need of particular protection from advertising. This recognition is based on research findings that children lack the cognitive capacity to understand the persuasive purpose of advertising and interpret it critically, and tend to accept advertising as truthful, accurate and unbiased.²⁴ The findings have led some commentators to argue that all advertising to young children can be regarded as inherently deceptive and unfair,²⁵ and this view was the basis for imposition of outright bans on advertising to children in Sweden, Quebec and Norway.²⁶

Some might query the proportionality of this regulatory response. However, it is more difficult to dispute the need for regulation to protect children from advertising for products, like unhealthy foods, that may damage children's health, as children are incapable of making rational decisions that take into account long-term health risks.²⁷ As Crouch argues, '[c]hildren are encouraged by [junk food] advertising to make decisions detrimental to their future even though they do not have the capacity to avoid such influence'.²⁸

There is general agreement between commentators on both sides of the debate as to the desirability of some form of regulation of food advertising to children, at least to ensure advertising 'is kept within reasonable bounds'.²⁹ However, there is strong disagreement as to the form this regulation should take: advertisers argue self-regulation is sufficiently robust to keep advertising in check and provides benefits, such as efficiency, flexibility, low cost for government and high levels of compliance; while health and consumer groups argue that the self-interest of advertisers limits the capacity of self-regulation to protect children and that government regulation is required.

22 Simone French, Mary Story and Cheryl Perry, 'Self-esteem and Obesity in Children and Adolescents: A Literature Review' (1995) 3 *Obesity Review* 479.

23 World Health Organization, *Obesity: Preventing and Managing the Global Epidemic*, above n 21.

24 Dale Kunkel et al, *Report of the APA Task Force on Advertising and Children* (2004) American Psychological Association <<http://www.apa.org/releases/childrenads.pdf>> at 23 April 2009.

25 See, eg, Dennis Crouch, 'The Social Welfare of Advertising to Children' (2002) 9 *University of Chicago Law School Roundtable* 179, 183.

26 In Sweden, commercial advertising in a television broadcast may not be designed to attract the attention of children under 12 years of age per s 4 of Chapter 7 of the *Radio and Television Act (1996: 844)*; in Norway, advertisements may not be broadcast on television in connection with children's programs, nor may advertisements be specifically directed to children per s 3–1 of the *Broadcasting Act 1992*; in Quebec, commercial advertising may not be directed to persons under 13 years of age per *Consumer Protection Act*, SN 1980, c 248.

27 Crouch, above n 25, 182.

28 *Ibid* 194.

29 Segelov, above n 4, 61.

III THE AANA SELF-REGULATORY SCHEME AND THE FOOD CODE

In 1998, the AANA established a new national scheme for self-regulating advertising, following the disbanding of the previous scheme administered by the Media Council of Australia in 1996. The Advertising Standards Bureau ('Bureau') administers the AANA scheme, and two boards – the Advertising Standards Board and the Advertising Claims Board – adjudicate advertising complaints submitted to the Bureau. The scheme comprises four codes of practice: the Advertiser Code of Ethics, the Federal Chamber of Automotive Industries Voluntary Code of Practice for Motor Vehicle Advertising, the Children's Code and the Food Code. The Advertising Claims Board adjudicates complaints (made mainly by industry competitors) under s 1 of the AANA Advertiser Code of Ethics, which relates to the truth, accuracy and legality of advertising. The Advertising Standards Board ('Board') hears public complaints under s 2 of the AANA Advertiser Code of Ethics, which requires compliance with the Children's Code and the Food Code.³⁰

The recently revised Children's Code contains one specific food advertising clause, which states that advertising or marketing to children for food or beverages must not encourage or promote an inactive lifestyle or unhealthy eating or drinking habits, and must comply with the Food Code.³¹ The Food Code contains general provisions on food advertising, and specific provisions on food advertising directed to children aged 14 years or younger. In summary, the Food Code states that food advertisements directed to children must not: be ambiguous, misleading or deceptive; seek to exploit children's imagination in a way that encourages excessive food consumption; state or imply that consuming a product gives children an advantage over their peers; undermine parents' role in guiding children's diets; appeal to children to ask parents to buy advertised products; use popular personalities or celebrities in a way that obscures the distinction between commercial and editorial content; or feature ingredients or premiums that are not integral elements of advertised products.³² The Food Code is intended to apply to all forms of food advertising to children through all media.³³

In addition to the Food Code, food advertising to children on free-to-air television is regulated to a limited extent under ACMA's Children's Television Standards (compliance with which is a licence condition for broadcasters under the *Broadcasting Services Act 1992* (Cth)), as well as the co-regulatory Commercial Television Industry Code of Practice 2004 (developed by commercial free-to-air television broadcasters pursuant to a requirement in the *Broadcasting Services Act 1992* (Cth)). The Children's Television Standards include general

30 Advertising Standards Bureau, *How to Complain* (2006) <<http://www.adstandards.com.au/pages/page38.asp>> at 23 April 2009.

31 AANA Code for Advertising and Marketing Communications to Children 2008 cl 2.10.

32 AANA Food and Beverages Advertising and Marketing Communications Code 2006 cl 3.6.

33 AANA, *Preamble to Original Version of the AANA Food and Beverages Advertising and Marketing Communications Code 2006* (2006) 1 (copy on file with the author). The preamble is not included with the current version of the AANA Food and Beverages Advertising and Marketing Communications Code 2008.

restrictions on the amount and content of advertising during children's free-to-air television programs, and one specific provision on food advertising, which prevents advertisements from containing any misleading or incorrect nutritional information.³⁴ The Commercial Television Industry Code contains a similar clause on food advertising to children,³⁵ and provides that broadcasters must comply with the AANA Codes.³⁶

Advertising on subscription television is regulated under the Australian Subscription Television and Radio Association ('ASTRA') Subscription Broadcast Television Code of Practice 2007 (developed by broadcasters pursuant to the *Broadcasting Services Act 1992* (Cth)). This Code does not deal specifically with food advertising to children, but also provides that advertising must comply with the AANA Codes.³⁷

However, aside from general prohibitions against misleading conduct in the *Trade Practices Act 1974* (Cth) and state and territory fair trading and food acts, food advertising to children through media other than television is subject only to self-regulation under the Code.

IV CONDITIONS AND CHARACTERISTICS NECESSARY FOR EFFECTIVE SELF-REGULATION

Self-regulation is generally understood to mean that industry, rather than government, is regulating its own practices. However, direct or indirect government involvement is usually not completely absent from self-regulatory schemes.³⁸ In fact, commentators often distinguish between types of self-regulation according to the level of government involvement in development or enforcement of self-regulatory rules.³⁹ For example: government may require an industry group to develop and enforce rules within a legislative framework; government may scrutinise, authorise, or enforce rules that have been developed by industry; or industry may develop rules without any direct government involvement or

34 Children's Television Standards 2005 cl 19(6).

35 Commercial Television Industry Code of Practice 2004 cl 6.23 states that food advertising to children should not encourage or promote an inactive lifestyle (defined as not engaging in much or any physical activity as a way of life) or unhealthy eating or drinking habits (defined as excessive or compulsive consumption of food or beverages), and must not contain any misleading or incorrect nutritional information.

36 Commercial Television Industry Code of Practice 2004 cl 6. However, neither the commercial television broadcasting industry nor the Australian Communications and Media Authority enforces compliance with the AANA Codes – complaints to broadcasters about breaches of the codes are referred to the Advertising Standards Bureau per cl 7 of the Commercial Television Industry Code of Practice 2004.

37 ASTRA Subscription Broadcast Television Code of Practice 2007 cl 6.1(a). However, neither the subscription television industry nor the Australian Communications and Media Authority enforces compliance with the AANA codes – broadcasters are required to refer complaints about breaches of the AANA codes to the Advertising Standards Bureau per cl 6.1(a).

38 Angela Campbell, 'Self-Regulation and the Media' (1998) 51 *Federal Communications Law Journal* 711.

39 See, eg, Julia Black, 'Decentering Regulation: The Role of Regulation and Self-Regulation in a Post-Regulatory World' (2001) 54 *Current Legal Problems* 103, 118.

oversight but in response to the threat of government regulation.⁴⁰ The Food Code is an example of the last type of self-regulation.

Advantages of self-regulation over government regulation typically claimed by its proponents include that it is better informed, more efficient, flexible, and cost-effective, and that industry is more motivated to comply with the rules it has developed. Disadvantages of self-regulation posited by critics include that it is self-serving, inadequately enforced, lacks independence, lacks credibility with consumers, and that procedures for rule development or complaint handling are insufficiently transparent, accountable or inclusive of all stakeholders.⁴¹

However, Black notes that these advantages or disadvantages cannot be assumed of all self-regulatory schemes – the success of self-regulation depends on the particular form it takes and the circumstances in which it operates.⁴²

Commentators and government guides to regulation identify a number of conditions in which self-regulation is suitable or most likely to be effective, as well as characteristics typical of, or necessary for, successful self-regulatory regimes.

These conditions or characteristics can be grouped into the following areas:

- nature of problem – strength of public interest concern, risk or impact;
- industry incentives and expertise to self-regulate;
- industry coverage;
- consultation in development of self-regulatory rules;
- clarity and efficacy of rules;
- industry and consumer awareness of rules;
- independence and stakeholder representation;
- complaint handling;
- compliance mechanisms;
- monitoring, reviews and reporting.⁴³

40 Ibid. See also Robert Baldwin and Martin Cave, *Understanding Regulation* (1999) 39–40; Campbell, above n 38, 714–15.

41 Baldwin and Cave, above n 40, 40–1; Campbell, above n 38, 717–18.

42 Black, above n 39, 123.

43 See, eg, Office of Best Practice Regulation, Australian Government, *Best Practice Regulation Handbook* (2007); Department of Treasury and Finance, Victorian Government, *Victorian Guide to Regulation* (2007); Australian Competition and Consumer Commission, Australian Government, *Guidelines for Developing Effective Voluntary Industry Codes of Conduct* (2005); Graeme Samuels, 'Industry Self-Regulation – Can Voluntary Self-Regulation Ever Be Effective?' (Speech delivered at the Centre for Corporate Public Affairs 2003 Oration, Melbourne, 20 November 2003); National Consumer Council (United Kingdom), *Three Steps to Credible Self-Regulation: A Checklist of Good Practice in Self-Regulation* (2003); Taskforce on Industry Self-Regulation, Australian Government, *Industry Self-Regulation in Consumer Markets* (2000); Industry Canada, Office of Consumer Affairs and Treasury Board Secretariat, Regulatory Affairs Division, *Voluntary Codes: A Guide For Their Development and Use* (1998); Consumer Affairs Division, Department of Industry, Science and Tourism, *Benchmarks for Industry-Based Customer Dispute Resolution Schemes* (1997).

The remainder of the paper describes these conditions and characteristics, and uses them as a framework to evaluate the efficacy of the Food Code and self-regulation for protecting children's interests in relation to food advertising.

A Nature of Problem – Strength of Public Interest Concern, Risk or Impact

Australian government guides to regulation advise that self-regulation should be considered where the problem in question poses 'no strong public interest concern, in particular, no major public health and safety concern' and 'the problem is a low-risk event, of low impact or significance'.⁴⁴ Hoek and Maubach note that even staunch supporters of self-regulation concede that it may not be suitable 'where the consequences of regulatory failure are serious'.⁴⁵

As discussed, food advertising to children has a deleterious impact on children's food preferences, diets and health, and children's credulity makes them incapable of resisting this influence. Evidence also indicates food advertising is a driver of increasing weight gain and obesity in children – an acute public health problem. The risks posed by food advertising to public health are not as immediate as problems like food contamination. However, the long-term public health impact of food advertising may be more significant.

The exact size of food advertising's effect on individual children's diets is uncertain, due to methodological difficulties in isolating this effect from other influences.⁴⁶ Advertisers refer to some findings of a small effect size as evidence that food advertising only has a small effect on children.⁴⁷ However, experts caution that these findings do not take into account indirect effects of food advertising on children's eating habits, for example, its influence in reinforcing social norms of unhealthy eating.⁴⁸ In addition, small effects on individual children's immediate behaviour equate to much larger effects at the population level and over the period of children's development, and '[c]umulatively, this may make an appreciable difference to the number of children who fall into the "obese category"'.⁴⁹

Overweight and obesity have a significant social and economic impact, due to their contribution to disability, loss of wellbeing and premature death, and associated health care costs and productivity losses.⁵⁰ Seven and a half per cent

44 Office of Best Practice Regulation, above n 43, 65; See also Department of Treasury and Finance, above n 43, B–1.

45 Janet Hoek and Ninya Maubach, 'Self-regulation, Marketing Communications and Childhood Obesity: A Critical Review from New Zealand' (2006) 39 *Loyola of Los Angeles Law Review* 139, 140.

46 Livingstone, above n 16, 13.

47 AANA, *Submission to the Australian and Media Authority on the Children's Television Standards Review*, above n 4.

48 Livingstone, above n 16, 14; Hastings et al, *Review of Research on the Effects of Food Promotion to Children*, above n 17, 3.

49 Livingstone, above n 16, 2.

50 Access Economics, *The Economic Costs of Obesity* (2006) <<http://www.accesseconomics.com.au/publicationsreports/showreport.php?id=102>> at 23 April 2009.

of the burden of disease and injury in Australia is attributable to overweight and obesity. This proportion is expected to increase further as the current generation of children reaches adulthood.⁵¹ The total cost of obesity in Australia in 2005 was estimated to be \$21 billion.⁵²

As such, food advertising to children arguably poses serious public health concerns, as well as social justice and ethical concerns, and is likely to have a high social impact, indicating that self-regulation may not be an appropriate regulatory solution.

B Industry Incentives and Expertise to Self-Regulate

For self-regulation to be effective, industry must have some vested interest or incentive in this being the case.⁵³ A criterion cited in government guides to regulation for considering the use of self-regulation to address a problem is whether the problem can be fixed by the market itself through incentives (such as industry survival or market advantage) for industry to develop and comply with self-regulatory arrangements.⁵⁴ However, it is not enough for industry to merely have an incentive for self-regulation to occur; it must also have an incentive for self-regulation to be effective.⁵⁵ Self-regulation is most likely to be successful when the interests of industry and consumers converge.⁵⁶

There is little market incentive for advertisers to develop and comply with effective self-regulation of food advertising to children. Compliance with self-regulation may benefit companies' reputations and promote consumer trust in brands. However, this would only really operate as an incentive if the profits from improved reputation would outweigh the losses a company would incur from not being able to use regulated advertising practices.⁵⁷ One might query whether compliance with self-regulation would be a sufficiently salient marketing point to affect the food choices of any parents or children. Much food advertising to children is not very visible to parents, especially advertising through 'new media' avenues like the internet, email and SMS, so parents may not be able to identify which companies advertise 'responsibly' to children. Children are unlikely to be aware advertising is influencing their food preferences, or to understand the significance of this (which, of course, is the crux of the problem). It is likely that a more effective and profitable marketing strategy would be for companies to engage in advertising practices that are effective for increasing or reinforcing

51 Stephen Begg et al, *The Burden of Disease and Injury in Australia 2003* (2007) 74.

52 Access Economics, above n 50, v.

53 Taskforce on Industry Self-Regulation, above n 43.

54 See, eg, Office of Best Practice Regulation, above n 43, 65; Department of Treasury and Finance, above n 43, B-1.

55 Taskforce on Industry Self-Regulation, above n 43.

56 Ibid.

57 Campbell, above n 38, 718; Peter Swire, 'Markets, Self-Regulation, and Government Enforcement in the Protection of Personal Information' (1997) National Telecommunications and Information Administration <<http://www.ntia.doc.gov/reports/privacy/selfreg1.htm#1A>> at 23 April 2009.

children's consumption of food products – the very practices self-regulation would need to curb in order to effectively protect children.

The only real incentive for the advertising industry to develop and comply with self-regulation of food advertising to children is to keep government regulation at bay. Advertisers regard self-regulation as part of the 'fight to protect advertising freedoms',⁵⁸ and the AANA acknowledges this was the motivation for development of the Food Code. A postscript to the Food Code (when first launched in 2006) stated that it was drafted:

in accord with the view ... that it is in the best interests of communities to avoid excessive regulation in the field of advertising and commercial communications that would hinder free trade and affect economic growth and development.⁵⁹

As long as the threat of government regulation remains credible, this may compel compliance with the Food Code.⁶⁰ However, Blakeney and Barnes argue that if the sole motivation for self-regulation is to deter government regulation, this will affect the scheme's credibility, and the incentive to comply will cease once the threat of government regulation recedes.⁶¹ Moreover, this threat alone is unlikely to be sufficient incentive for industry to ensure self-regulation is *effective* to protect the interests of children. The divergence between the interests of food advertisers and children is too great.

Food companies' interest in advertising to children is obviously to increase or reinforce sales of their products, and they are unlikely to be committed to regulation that may impede achievement of this aim. Indeed, their interest in self-regulating food advertising is to deflect government regulation that may have this effect. They are only likely to be motivated to develop and comply with self-regulation to the extent this is effective for creating the appearance of responsible conduct and useful as a public relations tool.

But if it is accepted that the public interest in regulating food advertising is to protect children's health, then regulation that impedes advertisers' ability to increase children's desire for, and thus sales of, advertised products is precisely what is needed. Nearly all food advertising in Australia is for unhealthy products, and overconsumption of these products is harmful to children's health and a driver of childhood obesity.

This conflict of interest has been a barrier to effective self-regulation of advertising of other harmful products, namely tobacco and alcohol. Chapman argues that

58 Simon Canning, 'Media in Coalition Against Regulation' *The Australian* (Sydney), 24 September 2007 <<http://www.theaustralian.news.com.au/story/0,25197,22468385-7582,00.html>> at 23 April 2009.

59 AANA, *Postscript to Original Version of the AANA Food and Beverages Marketing Communications Code 2006*, above n 7, 6.

60 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.

61 *Ibid* 146.

advertisers' incentive to self-regulate tobacco advertising was to create the 'appearance of self-regulation in the absence of actual self-regulation':⁶²

Obviously there is a conflict of interests [sic] between the commercial ambitions of the tobacco industry in wanting to increase sales and its desire to appear to be acting in the public interest by controlling promotion, which by definition seeks to increase sales. In the end, both cannot succeed, and it would be straining credulity to suggest that the tobacco industry could be expected to support actively any policy that was against its interests in the long term.⁶³

An oft-claimed advantage of industry self-regulation over government regulation is that industry expertise results in better informed rule making.⁶⁴ However, Swire cautions that, while it will always be in companies' interests to use their expertise in the marketplace to maximise profits, it may not be in companies' interests to apply their expertise to the development of self-regulation. Swire argues that the case for self-regulation depends on the existence of incentives for industry members to apply their expertise to self-regulation, and ensure that it 'will take shape in the form of well-drafted and effective self-regulation'.⁶⁵

It seems improbable that food advertisers would use their expertise in developing promotional techniques that are effective to increase product sales to develop rules that effectively restrict these techniques. Advertisers are more likely to use this expertise to design rules that appear to protect children from harmful advertising but that are sufficiently liberal to allow effective promotional strategies to continue.

C Industry Coverage

Literature on self-regulation widely recognises that effective self-regulation depends on adequate coverage of the regulated industry.⁶⁶ The Australian Competition and Consumer Commission advises that a scheme's level of coverage should be assessed by reference to the proportion of industry that subscribes to the scheme, as well as the extent to which the scheme addresses relevant issues.⁶⁷

The coverage of the AANA's self-regulatory scheme appears relatively wide in terms of the proportion of advertisers who are members. The AANA does not publish names of members, but claims that AANA members contribute 85 per cent of Australia's main media advertising expenditure, and include

62 Simon Chapman, 'A David and Goliath Story: Tobacco Advertising and Self-Regulation in Australia' (1980) 281 *British Medical Journal* 1187, 1189.

63 Ibid 1188.

64 Baldwin and Cave, above n 40, 40.

65 Swire, above n 57.

66 See, eg, Australian Competition and Consumer Commission, above n 43; Samuels, above n 43; Taskforce on Industry Self-Regulation, above n 43; National Consumer Council, above n 43; Consumer Affairs Division, above n 43.

67 Australian Competition and Consumer Commission, above n 43, 9.

Australia's leading food advertisers.⁶⁸ However, unlike under the old Media Council of Australia scheme, advertising agencies and media are not subject to the AANA scheme. Commentators argue that a 'tripartite' scheme, subscribed to by advertisers, advertising agencies and media, maximises the prospect of compliance, as agencies may be unwilling to produce non-compliant copy, and media may refuse to publish or broadcast it.⁶⁹

The aim of the Food Code was to cover 'the full spectrum of contemporary advertising and commercial communications'.⁷⁰ However, there are also gaps in the Food Code's coverage in terms of the types of advertising to which it applies. The Food Code applies to 'Advertising or Marketing Communication', defined in clause 1.1 as:

- (a) matter which is published or broadcast using any Medium in all of Australia or in a substantial section of Australia ... or
- (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 that product, service, person, organisation or line of conduct.⁷¹

The definition specifically excludes 'labels or packaging for products'.⁷²

The effect of this definition is that the Food Code does not apply to promotions directed to children on food packaging, despite food advertisers' common use of these promotions, which often feature popular characters, cartoons and other images of appeal to children, to attract children's attention and encourage 'pester power'.⁷³ Nor does the Code apply to advertising published in less than a substantial section of Australia. The Code does not define 'substantial section of Australia'⁷⁴ but presumably this would exclude all local advertising.

The definition of 'Advertising or Marketing Communication' – matter which is published or broadcast, or any activity undertaken by or on behalf of an advertiser 'for payment or other valuable consideration'⁷⁵ – also appears to exempt from the

68 AANA and Advertisers Federation of Australia, *Overview of the Advertising Industry in Australia* (2007).

69 Debra Harker, 'Towards Effective Advertising Self-Regulation in Australia: The Seven Components' (2003) 9 *Journal of Marketing Communications* 93; Debra Harker, Michael Harker and Michael Volkov, 'Developing Effective Advertising Self-Regulation in Australia: Reflections on the Old and New Systems' (2001) 9 *Australasian Marketing Journal* 7. (Under the old scheme, the advertising agency accreditation system also allowed sanctions to be imposed on agencies for breach of the self-regulatory rules, which further increased prospects of compliance.)

70 AANA, *Preamble to Original Version of the AANA Food and Beverages Advertising and Marketing Communications Code 2006*, above n 33, 3.

71 AANA Food and Beverages Advertising and Marketing Communications Code 2008 cl 1.1.

72 *Ibid.*

73 Kathy Chapman et al, 'The Extent and Nature of Food Promotion Directed to Children in Australian Supermarkets' (2006) 21 *Health Promotion International* 331, 338; Jones et al, above n 12.

74 AANA Food and Beverages Advertising and Marketing Communications Code 2008 cl 1.1.

75 *Ibid.*

Food Code's application any advertisement which a food company has not paid (or provided consideration to) a third party to publish, broadcast or undertake. However, the Bureau's interpretation of this exemption has been inconsistent.

Shortly after the Food Code was introduced, the executive director of the AANA stated that company-owned websites were excluded from the Food Code's application because they did not constitute paid advertising.⁷⁶ Accordingly, the Bureau did not submit to the Board for adjudication a complaint under the Food Code about a company-produced website promoting a confectionery product, and promotional emails sent by the company to children using details collected from the website, because the company had not paid a third party to publish or broadcast the website or emails.⁷⁷

More recently, however, the Bureau did submit to the Board complaints under the Food Code about company-owned websites promoting confectionery and fast food products in conjunction with the children's film, *Shrek the Third*, despite the fact the advertisers had not paid a third party to publish the promotions.⁷⁸ This was not based on any amendment to the definition of 'Advertising or Marketing Communication' but appeared to be due to a change in the Bureau's interpretation of what constitutes paid advertising: advertising that a company has *incurred cost* in publishing, rather than advertising the company has paid a third party to publish. In its decision on one of these complaints, the Board:

noted that [the McDonald's corporate website] is considered to be within the definition of advertising and/or marketing communications within the scope of the Food Code as it is material that is published, that the company has incurred cost in publishing.⁷⁹

On the other hand, the Bureau decided a complaint about in-store *Shrek the Third* food promotions in Coles Supermarkets and McDonald's stores (including Shrek posters, dolls and footprints) was outside the Board's jurisdiction for reasons including that the materials were 'not published using any "medium" and there was no consideration to Coles for placement of the material'.⁸⁰ It is unclear why these promotions were not also considered to constitute paid advertising, as presumably

76 Mark Metherell, 'Web Games Skirt Sugary Snacks Ad Ban', *The Sydney Morning Herald* (Sydney), 19 October 2006, 1.

77 Letter from Professor David Hill et al (on behalf of the Obesity Policy Coalition) to the Advertising Standards Board, 18 May 2007; Letter from Fiona Jolly (on behalf of Advertising Standards Bureau) to Professor David Hill (on behalf of Obesity Policy Coalition), 25 May 2007. See also Julian Lee, 'New Code Under Fire as Site Encourages Pester Power', *The Sydney Morning Herald* (Sydney), 14 June 2007, Business 27.

78 See Advertising Standards Board, *Case Report: McDonald's Australia Ltd (Shrek – Internet) Complaint Reference Number 256/07* (14 August 2007) <http://www.adstandards.com.au/pages/casestudy_search.asp?keyword=&PageIndex=28> at 23 April 2009. See also Advertising Standards Board, *Case Report: MasterFoods Australia/NZ (M'n'Ms – Shrek) Complaint Reference Number 252/07* (14 August 2007) <http://www.adstandards.com.au/pages/casestudy_search.asp?keyword=&PageIndex=28> at 23 April 2009.

79 Advertising Standards Board, *Case Report: McDonald's Australia Ltd (Shrek – Internet)*, above n 78, 2.

80 Letter from Fiona Jolly (Chief Executive Officer, Advertising Standards Bureau) to Professor Boyd Swinburn (Parents Jury), 27 August 2007.

the companies would also have incurred cost in causing the promotional materials to be published. It is also unclear why at least posters displayed in stores were not considered media, since the Food Code defines ‘medium’ as ‘*any medium whatsoever including without limitation cinema, internet, outdoor media, print, radio, television, telecommunications, or other direct-to-consumer media including new and emerging technologies*’.⁸¹

When these decisions were made, the ‘Advertising or Marketing Communication’ definition only included the first arm: ‘matter which is published or broadcast using any Medium’.⁸² The AANA has since expanded the definition to include ‘any activity which is undertaken by or on behalf of an advertiser’.⁸³ It is not clear how this will affect the Bureau’s interpretation of the Code’s application; it may mean that the Bureau will now consider in-store advertising to fall within the Code’s remit, but it does not seem to alter the requirement for a party to have received payment or consideration for publicising, broadcasting or undertaking the advertising.

Currently, therefore, the Food Code’s application to company-generated advertising, such as in-store promotions, websites and email or SMS marketing, is uncertain. It is clear, however, that the Food Code fails to meet its aim of covering ‘the full spectrum of contemporary advertising and commercial communications’;⁸⁴ at the very least, promotions on food packaging and local advertising are excluded from the Code. Food advertisers’ increasing use of new media channels and marketing techniques to target children means any regulation must meet this aim to be effective for safeguarding children’s interests.

D Consultation in Development of the Food Code

Commentators agree that consultation with stakeholders, including appropriate consumer groups and government, in development of self-regulatory schemes is essential to schemes’ effectiveness.⁸⁵ Consultation instills credibility with, and acceptance by, stakeholders and the public. It is also important for identifying specific problems within the industry, and public policy objectives schemes should be designed to meet.⁸⁶

The AANA consulted on the Food Code with government, politicians, and members of the food and advertising industries, but to a lesser extent with consumer and health stakeholders. The AANA developed the Food Code in conjunction with the

81 AANA Food and Beverages Advertising and Marketing Communications Code 2008 cl 1.1 (emphasis added).

82 AANA Food and Beverages Advertising and Marketing Communications Code 2006 cl 1.

83 AANA Food and Beverages Advertising and Marketing Communications Code 2008 cl 1.

84 AANA, *Preamble to Original Version of the AANA Food and Beverages Advertising and Marketing Communications Code 2006*, above n 33, 3.

85 See, eg, Australian Competition and Consumer Commission, above n 43; Samuels, above n 43; Taskforce on Industry Self-Regulation, above n 43; National Consumer Council, above n 43.

86 Taskforce on Industry Self-Regulation, above n 43.

Australian Food and Grocery Council (representing Australian food companies),⁸⁷ and consulted with government, politicians and industry on a draft version of the Food Code before publishing the draft Code on the AANA website and inviting comment from health and consumer groups and the broader public⁸⁸ – for a period of only two weeks.

A second round of public comment on the final version of the Food Code was invited for a one week period. However, this coincided with the week the four-yearly International Congress on Obesity was held in Sydney. This timing may not have been deliberate but had the effect of preventing most public health stakeholders commenting on the final Code.

Most changes to the Food Code following consultation were formal, and key concerns of consumer and health stakeholders did not appear to have been addressed. This was difficult to assess, however, because the AANA did not publish or discuss submissions, or describe and/or rationalise its changes to the Code. In addition, the AANA has amended the final version of the Code since its release (by expanding the definition of ‘Advertising and Marketing Communications’ and including a new definition of ‘Children’s Food or Beverage Product’) without undertaking further public consultation, or publicising and/or explaining the changes.⁸⁹ The AANA’s consultation on the Food Code was certainly not sufficiently lengthy, inclusive or transparent to ensure the credibility of the Code with all stakeholders.

E Clarity and Efficacy of the Food Code

To be effective, self-regulatory codes must include clear and measurable statements of their objectives, rooted in the rationale for intervention. Rules should be effective to achieve these objectives – they should address specific problems or concerns about industry practices and establish certain standards of conduct. Rules should also be written in clear, plain language to enable stakeholders to understand their rights and obligations under the scheme.⁹⁰

The Food Code fails to set out clear objectives. The object of the Code is expressed to be ‘to ensure that advertisers and marketers develop and maintain a high sense of social responsibility in advertising and marketing food and beverage products in Australia’.⁹¹ However, there is little clarity as to what constitutes social

87 AANA, *Postscript to Original Version of the AANA Food and Beverages Marketing Communications Code 2006*, above n 7, 3.

88 Interview with Clare Hughes, Senior Food Policy Officer, *Choice* (Telephone interview, 14 September 2007).

89 AANA, *Postscript to Original Version of the AANA Food and Beverages Marketing Communications Code 2006*, above n 7; cf AANA Food and Beverages Advertising and Marketing Communications Code 2008 (current version).

90 See Australian Competition and Consumer Commission, above n 43; Samuels, above n 43; Taskforce on Industry Self-Regulation, above n 43; National Consumer Council, above n 43.

91 AANA, *Preamble to Original Version of the AANA Food and Beverages Advertising and Marketing Communications Code 2006*, above n 33, 1.

responsibility in food advertising, and advertisers' and consumers' perceptions of this are likely to differ. This statement would hardly either help stakeholders to understand what the Code intends to achieve, or enable the Code's performance to be assessed.

The Food Code provisions also fail to address major concerns about food advertising to children or to impose clear obligations on advertisers sufficient to protect children's interests.

A traditional criticism of self-regulation – that rules are self-serving and tokenistic⁹² – can be made of the Code provisions on food advertising to children. The provisions seem designed to create the impression that they address stakeholder concerns by circumscribing advertising practices that would be inappropriate and harmful if ever used, but (as observed by Handsley et al in relation to the AANA Code for Advertising to Children⁹³) 'address a kind of advertising that has rarely if ever been seen'.⁹⁴ The provisions are poorly targeted and apply narrowly. They are drafted in convoluted and ambiguous language, and interpreted in the Practice Note to the Food Code⁹⁵ restrictively and inconsistently with a literal reading.

The major concern of stakeholders and risk to children's health is the enormous volume of food advertising directed to children in different media, contexts and locations, and the fact that nearly all this advertising is for unhealthy foods which are likely to lead to weight gain if overconsumed.⁹⁶ Stakeholders are primarily concerned with the cumulative impact of this unhealthy food advertising on children over time rather than the acute effects of individual food advertisements.⁹⁷

To effectively address this problem, regulation would need to restrict the amount, timing and placement of unhealthy food advertising in media directed to children, or settings in which children are likely to be present.⁹⁸ The Food Code does not, and is not intended to, have this effect. The executive director of the AANA has said that the Code 'does not and cannot attend to the frequency [nor] the placement of advertisements',⁹⁹ but 'helps to ensure the content of advertisements "is kept within reasonable bounds"'.¹⁰⁰

92 Baldwin and Cave, above n 40, 40.

93 Now called the AANA Code for Advertising and Marketing Communications to Children.

94 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, 101.

95 AANA, *AANA Food and Beverages Code Practice Note* (2008) 5.

96 See, eg, Australian Consumers' Association, *Comments on the Australian Association of National Advertisers Draft Food and Beverages Communications Code* (2006) <<http://www.choice.com.au/files/fl24890.pdf>> at 23 April 2009; Coalition on Food Advertising to Children, above n 2; Obesity Policy Coalition, *Submission to the Australian Communication and Media Authority's Children's Television Standards Review* (2007) Australian Communications and Media Authority <http://www.acma.gov.au/webwr/_assets/main/lib310132/39_obesity_policy_coalition.pdf> at 23 April 2009.

97 *Ibid.* See also Hawkes, above n 12.

98 Hawkes, above n 12.

99 Segelov, above n 4, 203.

100 *Ibid.*: cited in Social Development Committee, Parliament of South Australia, *Fast Foods and Obesity Inquiry Twenty-Fifth Report* (2007) 60.

In fact, the Code contains blunt provisions that purport to prevent advertisements that encourage overconsumption of food (clause 3.2), undermine parents' efforts to guide children's diets (clause 3.4), or create pester power (clause 3.5), when these problems are far more likely to be cumulative effects of children's exposure to a large volume of food advertising.

A case in point is clause 3.5, which purports to address food advertising's influence on 'pester power' (children's demands for parents to buy advertised products) – a major concern of health and consumer groups and parents.¹⁰¹ Clause 3.5 states that food advertisements directed to children 'shall not include any appeal to children to urge parents and/or other adults responsible for a child's welfare to buy particular products for them'. In practice, clause 3.5 only applies to advertisements that explicitly direct a child to urge parents to buy products for them, or implicitly appeal to children to do this by portraying a child engaging in this behaviour. The Practice Note explains that an advertisement should not include 'such urging as "Ask Mummy to buy you one"',¹⁰² and that an example of an implicit appeal to children would be an advertisement portraying a child in a supermarket asking for a product or putting it into a shopping trolley without asking.¹⁰³

The Parents Jury (a parents' advocacy network) recently made a series of complaints under clause 3.5 about the recent spate of *Shrek* food promotions on the grounds that association of unhealthy food products with the *Shrek* film and characters, and offers of *Shrek*-themed premiums, encouraged children to urge parents to buy products for them.¹⁰⁴ The Board rejected each complaint because the promotions did not 'contain any direct appeal to a child to ask a parent to buy the product'¹⁰⁵ and 'did not amount to "an appeal to children to urge parents to buy particular products for them"'.¹⁰⁶

101 Belinda Morley, *National Community Survey of TV Food Advertising to Children* (2007) Coalition on Food and Advertising to Children <http://www.cfac.net.au/downloads/cmmnty_attitudes_survey.pdf> at 23 April 2009. See also, Coalition on Food Advertising to Children, above n 2; Obesity Policy Coalition, *Submission to the Australian Communication and Media Authority's Children's Television Standards Review*, above n 96.

102 AANA, *AANA Food and Beverages Code Practice Note*, above n 95, 5.

103 Ibid.

104 Letter from the Parents Jury to the Advertising Standards Board, 10 July 2007, in *Obesity Policy Coalition* <<http://www.opc.org.au/browse.asp?ContainerID=complaints>> at 23 April 2009. The Parents Jury is a web-based forum for parents to express their views and collectively advocate for the improvement of children's food and physical activity environments: Parents Jury, *Campaign Spotlight* (2009) <<http://www.parentsjury.org.au/index.asp>> at 23 April 2009.

105 Advertising Standards Bureau, *Case Report: Coles (Shrek Supermarket Catalogue)* Complaint Reference Number 251/07 (14 August 2007) [3] <http://www.adstandards.com.au/pages/casestudy_search.asp?keyword=&PageIndex=27> at 23 April 2009.

106 Ibid. See also Advertising Standards Bureau, *Case Report: McDonald's Australia Ltd (Shrek – Internet)*, above n 78, 3; Advertising Standards Bureau, *Case Report: Kellogg Australia Pty Ltd (Shrek – Internet)* Complaint Reference Number 258/07 (14 August 2007) [3] <http://www.adstandards.com.au/pages/casestudy_search.asp?keyword=&PageIndex=27> at 23 April 2009; Advertising Standards Bureau, *Case Report: Ferrero Australia Pty Ltd (Nutella)* Complaint Reference Number 228/07 (14 August 2007) 3 <http://www.adstandards.com.au/pages/casestudy_search.asp?keyword=&PageIndex=27> at 23 April 2009; Advertising Standards Bureau, *Case Report: McDonald's Australia Ltd (Happy Meals – Shrek)* Complaint Reference Number 249/07 (14 August 2007) 3 <http://www.adstandards.com.au/pages/casestudy_search.asp?keyword=&PageIndex=27> at 23 April 2009; Advertising Standards Bureau, *Case Report: MasterFoods Australia/NZ (M'n'Ms – Shrek)*, above n 78, 3.

In reality, advertisers rarely engage pester power by explicitly directing children to urge parents to buy products, or showing children doing this (and one might query whether this would be an effective advertising strategy); instead, they use techniques such as premium offers and product endorsements by popular children's characters or personalities, or associate products with fun, happiness, excitement or social success, to make children desire products so they will pester parents to buy them. As discussed, pester power is also likely to be a product of the amount of food advertising to which children are exposed, since evidence shows that children's exposure to food advertising (irrespective of its type) increases children's demands for such products.¹⁰⁷

Although the volume of unhealthy food advertising directed to children is stakeholders' primary concern, certain advertising techniques, such as those described above, are also of issue because they are particularly effective in encouraging children to desire advertised products, take particular advantage of children's vulnerability, and 'engage children in a way that is likely to make them less receptive to messages about healthy eating'.¹⁰⁸ Provisions of the Food Code purport to address these techniques, but are poorly targeted, apply narrowly, and are restrictively interpreted, giving advertisers almost unfettered scope to continue using the techniques in question.

For example, the Food Code purports to prevent use of personalities or celebrities in food advertising to children. Clause 3.6 of the Code states that food advertising directed to children 'shall not use popular personalities or celebrities (live or animated) to advertise or market products, premiums or services in a manner that obscures the distinction between commercial promotions and program or editorial content'. However, clause 3.6 does not prevent use of personalities or celebrities, provided this occurs in what is clearly an advertisement and not part of program or editorial content. In practice, the only application of clause 3.6 is likely to be to prevent a personality from a particular program promoting a product within the program, or in an advertisement shown in a break during the program.

As a result, clause 3.6 fails to address the real mischief associated with product endorsements by popular children's characters or personalities – that, since children cannot understand the persuasive purpose of advertisements or interpret them critically, they are likely to take such endorsements at face value. Children are likely to trust, admire and/or aspire to be like, popular personalities, making these endorsements particularly potent. The appearance of a popular personality in an advertisement would have these effects regardless of whether it blurred the distinction between the advertisement and a program.

The Food Code also purports to prevent premium offers in food advertising to children – a measure health and consumer stakeholders consider necessary to protect the interests of children because premiums promote pester power, encourage repeat purchases and overconsumption of products, and influence

107 Hastings et al, *The Extent, Nature and Effects of Food Promotion to Children: A Review of the Evidence*, above n 16.

108 Hoek and Maubach, above n 45, 157.

children to desire and to consume advertised products for reasons unrelated to the products' attributes.¹⁰⁹ Clause 3.7 states that food advertising directed to children 'shall not feature ingredients or premiums that are not an integral element of the product/s or service/s being offered'.

This would appear to prevent any use of premiums in food advertising directed to children. However, the Practice Note to the Code states that, in determining whether an advertisement breaches clause 3.7, 'the Board will consider whether the ingredient or premium is given undue prominence by way of being made the dominant feature or otherwise occupies more than half of the advertisement'. The Board has rejected a number of complaints about premiums in children's food advertisements (at least partly) on the basis that the premiums were not the 'dominant feature' of the advertisements.¹¹⁰

In one case, the Board decided that an advertisement promoting six collectable *Shrek* 'Static Mate' stickers in jars of Nutella (a chocolate spread for children) did not breach clause 3.7 because the stickers were not given 'undue prominence' according to the Practice Note.¹¹¹ This was despite the fact that the entire advertisement comprised scenes from *Shrek* or promotion of the stickers. The advertisement opened with a scene of film characters Shrek and Fiona waking up and wishing each other good morning. It then showed two children eating Nutella for breakfast, when the stickers in question flew out of the Nutella jar and around the heads of the delighted children, leaving trails of sparkles in the air, before landing on the fridge door, glowing in the dark, and in a 'magical' cloud of sparkles zooming past the excited children back into the Nutella jar. The advertisement concluded with a still shot of the six stickers lined up in front of a Nutella jar. Meanwhile, the narrator urged children to '[m]ake a good morning great with the delicious taste of Nutella! Collect Shrek and friends on six Static Mates and catch Dreamworks' *Shrek the Third* in cinemas now'.¹¹² It is difficult to imagine how an advertisement could feature a premium more prominently than in this example.

In addition, the Board has decided that toys included with or as part of fast food meals are 'integral' elements of products and therefore not premiums.¹¹³ For instance, the

109 Coalition on Food Advertising to Children, above n 2; Obesity Policy Coalition, *Submission to the Australian Communication and Media Authority's Children's Television Standards Review*, above n 96.

110 See Advertising Standards Bureau, *Case Report: McDonald's Australia Ltd (Happy Meals – Shrek)*, above n 106; Advertising Standards Bureau, *Case Report: Hungry Jack's (Kids Club Meals – Golden Compass)* Complaint Reference Number 73/08 (9 April 2008) <http://www.adstandards.com.au/pages/casestudy_search.asp?keyword=&PageIndex=18> at 23 April 2009; Advertising Standards Bureau, *Case Report: Nestle Australia Ltd (Nesquik Cereal – Golden Compass)* Complaint Reference Number 31/08 (13 February 2008) <http://www.adstandards.com.au/pages/casestudy_search.asp?keyword=&PageIndex=20> at 23 April 2009; Advertising Standards Bureau, *Case Report: Ferrero Australia Pty Ltd (Nutella)*, above n 106.

111 Advertising Standards Bureau, *Case Report: Ferrero Australia Pty Ltd (Nutella)*, above n 106, 3.

112 *Ibid* 1.

113 See Advertising Standards Bureau, *Case Report: McDonald's Australia Ltd (Happy Meals – Kitty and Spy Gear)* Complaint Reference Number 197/06 (13 July 2006) <http://www.adstandards.com.au/pages/casestudy_search.asp> at 23 April 2009; Advertising Standards Bureau, *Case Report: McDonald's Australia Ltd (Happy Meals – Shrek)*, above n 106; Advertising Standards Bureau, *Case Report: Hungry Jack's (Kids Club Meals – Golden Compass)*, above n 110.

Board recently rejected a complaint about an advertisement for Hungry Jack's 'Kids Club Meals' promoting free 'animal character' toys from children's film *Golden Compass* because the toys were an 'integral part of the Kids Meal and [could not] be purchased separately'.¹¹⁴ This means that most promotion of premiums by fast food companies such as McDonald's and Hungry Jack's is outside the Food Code's ambit. The Board's decisions demonstrate that the Food Code has little, if any, application in practice to premium offers in children's food advertisements.

The Food Code's failure to include effective restrictions of food advertising to children is typical of self-regulation of food advertising internationally. Hawkes analysed self-regulation of food advertising in the United States, United Kingdom, Canada and Singapore, and observed that 'none of the [self-regulatory organisations] have in their mandate the control of the quantity, location, or emotional power of such promotions, nor the full spectrum of promotional techniques'.¹¹⁵ Consequently, Hawkes concluded, self-regulation was incapable of addressing unhealthy diets among children:

Self-regulation can prevent advertisements that show children eating several packs of crisps in one sitting – but not control the quantity or location of advertisements targeting children at numerous times and places through the day. Self-regulation can ensure advertisements do not show children engaging in harmful acts or pestering their parents – but cannot prevent beguiling children with effective, exciting and emotional images that make children want to try the promoted products – and pester their parents to get them. In other words, self-regulation cannot prevent marketing that works.¹¹⁶

F Industry and Consumer Awareness of the Food Code

Effective self-regulation also depends on industry understanding its obligations, and modifying its practices accordingly, and on consumers being aware of the rules and encouraged to make complaints about offending advertisements.¹¹⁷ The Bureau takes steps to educate industry about their obligations under the AANA codes, including conducting seminars, promoting the AANA scheme through industry meetings and conferences, and publishing a quarterly newsletter.¹¹⁸ It also publishes all Board decisions on the Bureau website.¹¹⁹

114 Advertising Standards Bureau, *Case Report: Hungry Jack's (Kids Club Meals – Golden Compass)*, above n 110.

115 Hawkes, above n 12, 380.

116 *Ibid.*

117 Taskforce on Industry Self-Regulation, above n 43; National Consumer Council, above n 43; Hoek and Maubach, above n 45.

118 Advertising Standards Bureau, *AdStandards News* (2009) <<http://www.adstandards.com.au/pages/page45.asp>> at 25 April 2009.

119 Advertising Standards Bureau, *Outcome of Complaints Dealt with by the Advertising Standards Board* (2009) <<http://www.adstandards.com.au/pages/casestudy.asp>> at 25 April 2009.

However, the Bureau has not taken steps to publicise the release of the Food Code to consumers nor conducted a concerted consumer awareness campaign since 2005. The AANA described the small number of complaints under the Food Code in the six months following its release as an ‘indication of the true level of public concern in relation to food and beverage advertising’.¹²⁰ But this seems more likely to reflect lack of public awareness of the Food Code’s existence. There was a significant increase in complaints to the Bureau following its last television advertising campaign in October 2005, which the Bureau attributed to the success of the campaign rather than increasing consumer concern about advertising.¹²¹ The Bureau planned to run a new advertising campaign in 2008,¹²² and it would be instructive to note whether an increase in complaints under the Food Code followed.

G Independence and Stakeholder Representation

Independence from industry and representation of consumers and other stakeholders, in both administration of self-regulatory schemes and complaints handling, is generally considered vital to effective operation of self-regulation.¹²³ Independence and representation are thought necessary to ensure that ‘the processes and decisions of the scheme are objective and unbiased and are seen to be objective and unbiased’¹²⁴ and ‘the code is more robust in terms of consumer protection and more likely to be accepted by stakeholders’.¹²⁵

Best practice guidelines advise that people responsible for determining complaints should not be selected directly by scheme members¹²⁶ and that at least half, or even three-quarters, of decision-making bodies should comprise consumer or public interest stakeholder representatives,¹²⁷ whom consumer organisations should be involved in appointing.¹²⁸ Consumer representatives must be ‘capable of reflecting the viewpoints and concerns of consumers’,¹²⁹ and be ‘people in whom consumers and consumer organisations have confidence’.¹³⁰ This might be seen as particularly

120 AANA, *Submission to the Australian and Media Authority on the Children’s Television Standards Review*, above n 4.

121 Advertising Standards Bureau, *Review of Operations 2005 (2005)* [3] <http://www.adstandards.com.au/pages/images/ASB_review_of_ops.pdf> at 23 April 2009.

122 Advertising Standards Bureau, *ASB Releases World First Research (2007)* <http://www.adstandards.com.au/pages/images/ASB_research_flyer3.pdf> at 23 April 2009.

123 See, eg, Australian Competition and Consumer Commission, above n 43; Consumer Affairs Division, above n 43; National Consumer Council, above n 43; Industry Canada, above n 43.

124 Consumer Affairs Division, above n 43.

125 Australian Competition and Consumer Commission, above n 43.

126 Consumer Affairs Division, above n 43.

127 Australian Competition and Consumer Commission, above n 43; National Consumer Council, above n 43.

128 Consumer Affairs Division, above n 43.

129 Ibid 15.

130 Ibid.

important in relation to the Board because the AANA codes require judgments of 'prevailing community standards' in relation to advertising content.¹³¹

Administration of the AANA scheme is clearly not independent of industry or representative of non-industry stakeholders. The Bureau's Board of Directors, responsible for the Bureau's management and corporate governance, consists entirely of people holding executive or marketing positions with major advertisers – most of which are food companies, and its chair, Ian Alwill, is also chairman of the AANA and executive director of group marketing and communications for Nestle Australia.¹³²

The Bureau states that Advertising Standards Board members 'do not represent any particular interest group and are individually and clearly independent of the industry'.¹³³ However, the process for appointing members may cast doubts on the Board's objectivity. Inaugural appointments to the Board have been made by the chairman of the AANA, and new appointments are made by the Bureau's Board of Directors, following interviews.¹³⁴ The Bureau states that it seeks appointees who 'have an interest in advertising and community standards, and have views on advertising',¹³⁵ indicating that candidates' views on advertising may be canvassed.

Members of the Board are well credentialed, and laudably, all are community rather than industry representatives. However, there is an over-representation of members who work, or have backgrounds, in marketing, media and the arts, and no representation of consumer or public health stakeholders. Of the 16 Board members, one currently works in marketing, three more have marketing backgrounds, three are journalists, and four work in the arts. One member has experience in child health services, and expertise in child development and education, which would be useful in considering the impact of advertising on children. But no members have background or expertise in public health policy, which is arguably necessary to properly understand the public health implications of food advertising.¹³⁶

At present, neither the Bureau nor the Board is sufficiently independent or representative of consumers to ensure the AANA scheme's processes and decisions are impartial and accepted by the community, or to provide a robust level of consumer protection.

131 See AANA Food and Beverages Advertising and Marketing Communications Code 2008 clause 1; AANA Code for Advertising and Marketing Communications to Children 2005 clause 1; AANA Code of Ethics Preamble.

132 Advertising Standards Bureau, *Review of Operations 2006* (2006) [9] <http://www.adstandards.com.au/pages/images/2006_Review_of_Ops.pdf> at 24 April 2009; Paul McIntyre, 'A Tough Gig – and Someone Fresh Will Have to Do It' *Sydney Morning Herald* (Sydney), 24 April 2008, 35. McIntyre notes that Ian Alwill has notified the AANA Board that he will not seek re-election as chairman at the next Annual General Meeting, and has advised the Board that his replacement should not be a member of the food and beverage industry, presumably, due to concerns about perceptions of partiality in light of the increasing scrutiny of food advertising.

133 Advertising Standards Bureau, *Review of Operations 2005*, above n 121, 5.

134 *Ibid.*

135 *Ibid.*

136 Advertising Standards Bureau, *Board Members* (2008) <<http://www.adstandards.com.au/pages/page15.asp>> at 24 April 2009; Advertising Standards Bureau, *Review of Operations 2006*, above n 132.

H Complaint Handling

Clearly, for self-regulation to be effective, it must be supported by an effective complaint-handling scheme. Indeed, provision of speedy, cost-effective dispute resolution is one of the major propounded advantages of self-regulation over government regulation.¹³⁷ The Commonwealth Government has developed benchmarks for industry dispute resolution, which relate to the accessibility, independence, fairness, accountability, efficiency and effectiveness of dispute resolution schemes.¹³⁸

The major advantage of the AANA scheme is its efficiency in handling complaints: the Board sits monthly, but may convene additional 'urgent' meetings,¹³⁹ and the maximum turnaround for decisions is six weeks.¹⁴⁰ (In comparison, the Australian Communications and Media Authority typically takes four to five months to resolve complaints under the Children's Television Standards.)¹⁴¹

As discussed, there are indications that consumer awareness of the scheme is not at desirable levels, and the complexity and overlap of various regulations applying to food advertising may deter complainants. But otherwise the scheme is reasonably accessible: participation is free, complaint procedures are explained clearly on the Bureau website, complaints must be in writing but may be lodged by fax, post, email or online, and a standard complaints form is provided.¹⁴² Accessibility could be improved, however, if telephone complaints were allowed, and assistance was provided to non-English-speaking and disadvantaged complainants.

In most respects, the scheme is also fairly transparent and accountable. Reasons for Board decisions about advertisements are provided promptly to complainants and advertisers; and decisions, complaint statistics and annual reviews of the Bureau's operations (conducted internally) are published on the Bureau's website.¹⁴³ On the other hand, the Bureau does not publish reasons for its decisions to reject complaints that fall outside the scheme's jurisdiction prior to Board determination, and external audits of the Bureau's and Board's performances, which are considered important for ensuring accountability and enabling identification of systemic problems, are not conducted.

137 Baldwin and Cave, above n 40, 40; Debra Harker, Glen Wiggs and Michael Harker, 'Responsive Advertising Regulation: A Case Study from New Zealand' (2005) 40 *Australian Journal of Political Science* 541, 543; Advertising Standards Bureau, *Review of Operations 2005*, above n 121.

138 Consumer Affairs Division, above n 43.

139 Advertising Standards Bureau, *Review of Operations 2005*, above n 121, 4. 'Urgent meetings' might be held to consider advertisements which have attracted a high number of complaints and which are running for a short time period or appear likely to breach AANA codes.

140 Interview with Fiona Jolly, Chief Executive Officer, Advertising Standards Bureau (Telephone interview, 27 September 2007).

141 This is acknowledged on Australian Communication and Media Authority, *What ACMA Will Do with Your Complaint* (2009) <http://www.acma.gov.au/WEB/STANDARD/pc=PC_90145> at 23 April 2009.

142 Advertising Standards Bureau, *Advertising Standards Board Complaints Process* <http://www.adstandards.com.au/pages/images/Complaints_%20process.pdf> at 23 April 2009.

143 Advertising Standards Bureau, *Advertising Standards Bureau*, <<http://www.adstandards.com.au>> at 25 April 2009; Advertising Standards Bureau, *Review of Operations 2006*, above n 132.

The scheme performs most poorly on fairness criteria. The Board's deliberation process appears sound – decisions are made by majority vote, and the chair, who rotates at each sitting, has the casting vote if the Board's vote is tied.¹⁴⁴ But the complaint-resolution process as a whole lacks all elements necessary for procedural fairness. The Bureau peremptorily rejects complaints it decides are outside the Board's jurisdiction, on grounds including that complaints do not raise issues under the AANA codes, or the matter complained about does not meet relevant definitions of advertising.¹⁴⁵ Advertisers are notified of complaints against them and, if complaints are submitted to the Board, are given the opportunity to put their cases, but complainants are not able to rebut advertisers' arguments.¹⁴⁶ The Bureau recently instituted a process for complainants and advertisers to seek review of the Board's decisions by an 'Independent Reviewer'.¹⁴⁷ However, the fees of \$500 for consumers and \$1000 for incorporated associations to lodge review requests would be prohibitive for most of these complainants, and fees are not refundable if the Independent Reviewer decides the grounds for review are not met.¹⁴⁸ If the Independent Reviewer accepts a review request, she can recommend that the Board's decision be reviewed or amended, but the Board has the final decision on the review outcome.¹⁴⁹

Perhaps most significantly, the Board cannot hear fresh complaints about advertisements on which it has made determinations in the previous five years, even if novel issues or arguments are raised, or complaints are made under different codes.¹⁵⁰

The low proportion of complaints upheld by the Board and its predecessor, the Advertising Standards Council, has led commentators to query the effectiveness and robustness of these bodies' decision-making.¹⁵¹ Critics have argued that reliance on voluntary membership of the scheme and voluntary compliance with decisions produces timidity in decision-making due to the fear that advertisers will refuse to comply with directions to withdraw advertisements or exit the scheme.¹⁵²

144 Advertising Standards Bureau, *Advertising Standards Board Complaints Process*, above n 142.

145 Advertising Standards Bureau, *Review of Operations 2005*, above n 121.

146 Advertising Standards Bureau, *Advertising Standards Board Complaints Process*, above n 142.

147 Advertising Standards Bureau, *Independent Reviewer (2006)* <<http://www.adstandards.com.au/pages/page64.asp>> at 23 April 2009. The Bureau has appointed the Hon Deirdre O'Connor as the first Independent Reviewer for the AANA self-regulatory scheme.

148 The grounds for review are: 'where new or additional relevant evidence which could have a bearing on the decision becomes available (an explanation of why it was not submitted previously will be required); where there was a substantial flaw in the Board's decision (decision clearly in error having regard to the provisions of the Code, or clearly made against the weight of evidence)'. *ibid.*

149 *Ibid.*

150 Advertising Standards Bureau, *What Happens to Public Complaints (2009)* <<http://www.adstandards.com.au/pages/page21.asp>> at 23 April 2009; Advertising Standards Bureau, *Review of Operations 2005*, above n 121, 29.

151 Gayle Kerr and Cheryl Moran, 'Any Complaints? A Review of the Framework of Self-Regulation in the Australian Advertising Industry' (2002) 8 *Journal of Marketing Communications* 189; Blakeney and Barnes, above n 60; Harker, Harker and Volkov, 'Developing Effective Advertising Self-Regulation in Australia: Reflections on the Old and New Systems', above n 69.

152 Blakeney and Barnes, above n 60, 147; Harker, Harker and Volkov, 'Developing Effective Advertising Self-Regulation in Australia: Reflections on the Old and New Systems', above n 69, 14.

The extent to which the low proportion of complaints upheld by the Board reflects a failure of the Board's decision-making due to timidity, industry-capture, or disconnection with community values is unclear. It may also reflect problems with the AANA codes, such as ambiguity or failure to address key concerns, or complainants' failures to make valid arguments or raise issues of significance to the wider community. But even taking these possibilities into account, the proportion of complaints upheld seems unduly low. For example, the Board only upheld complaints in relation to five per cent of advertisements it considered in 2006¹⁵³ and four per cent of advertisements it considered in 2005.¹⁵⁴ In comparison, in 2005–06, the Australian Communications and Media Authority upheld 24 per cent of complaints it investigated against television and radio broadcasters (under broadcasting industry codes, licence conditions and the *Broadcasting Services Act 1992* (Cth)), and in 2006–07, it upheld 33 per cent of complaints it investigated.¹⁵⁵

In any event, there are significant deficiencies in the procedural fairness of the AANA scheme's complaint-resolution process, which are likely to undermine effective decision-making.

I Compliance Mechanisms

Clearly, for self-regulation to be effective, it must include mechanisms to ensure it is complied with. Most commentaries on self-regulation include the availability of commercially significant sanctions for non-compliance as a requirement for successful self-regulation.¹⁵⁶

In this case, the availability of sanctions effective to deter breaches of the Food Code might be seen as particularly critical since advertisements are not pre-vetted or monitored for compliance. By the time the Board receives complaints and makes determinations, short advertising campaigns may already have concluded, and children may already have been exposed to their harmful effects.¹⁵⁷ However, one of the most persistent criticisms of the AANA's self-regulatory system (and advertising self-regulation in general) is its lack of teeth.¹⁵⁸ When the Board

153 Advertising Standards Bureau, *Advertising Standards Bureau*, above n 142; Advertising Standards Bureau, *Review of Operations 2006*, above n 132.

154 Advertising Standards Bureau, *Review of Operations 2005*, above n 121.

155 Australian Communications and Media Authority, *ACMA Communications Report 2006–07* (2008) 66.

156 See, eg, Australian Competition and Consumer Commission, above n 43; Consumer Affairs Division, above n 43; National Consumer Council, above n 43; Industry Canada, above n 43; Harker, 'Towards Effective Advertising Self-Regulation in Australia: The Seven Components', above n 69.

157 The Advertising Standards Board may convene 'urgent meetings' to consider advertisements that are running for short time periods, but this only seems to be the case if advertisements are considered controversial and have attracted a high number of complaints. See Advertising Standards Bureau, *Review of Operations 2005*, above n 121, 4.

158 See, eg, Harker, 'Towards Effective Advertising Self-Regulation in Australia: The Seven Components', above n 69; Debra Harker and Michael Harker, 'Establishing New Advertising Self-Regulatory Schemes: A Comparison of the UK and Australian Approaches' (2000) 59(2) *Australian Journal of Public Administration* 56; Kerr and Moran, above n 151, 199; Harker, Harker and Volkov, 'Developing Effective Advertising Self-Regulation in Australia: Reflections on the Old and New Systems', above n 69; Blakeney and Barnes, above n 60, 145.

upholds complaints, it requests advertisers to modify or withdraw the offending advertisements.¹⁵⁹ It also publishes determinations on the Bureau website and may release them to the media. But the Board has no power to enforce its decisions or impose sanctions on non-compliant advertisers. The AANA acknowledges that ‘the authority of the [scheme] rests on the willingness of advertisers to adhere voluntarily to ethical standards’.¹⁶⁰

Despite the absence of enforcement mechanisms, the AANA and the Bureau have boasted a ‘virtually 100% level of compliance’¹⁶¹ with Board determinations in recent years. A notable exception was the case of Windsor Smith in 2000: the Board upheld complaints about outdoor advertising for Windsor Smith shoes featuring a woman’s face near a man’s groin, which caused widespread public consternation; but Windsor Smith refused to withdraw the advertising.¹⁶² In addition, some advertisers have taken as long as 11 days to withdraw offending advertisements.¹⁶³

However, the level of advertisers’ compliance with the Food Code is a more important benchmark than level of compliance with Board determinations. The latter consideration is of little consequence if complaints about offending advertisements are rarely upheld and the consequences of breaching the Code do not act as a deterrent. As noted, short advertising campaigns may have finished running by the time the Board makes determinations. In such cases, critics argue that ordering withdrawal of an advertisement is hardly an effective sanction.¹⁶⁴

Blakeney and Barnes comment that publicity can be an effective sanction for regulating industry conduct.¹⁶⁵ In this case, however, risk of adverse publicity seems unlikely to be a very effective deterrent, since the Board’s rate of upholding complaints is so low. Hoek and Maubach point out that publishing a complaint body’s decisions provides no guarantee the decisions will be given prominence in the media.¹⁶⁶ There is also a risk some advertisers would welcome any publicity associated with an adverse Board ruling.

J Monitoring, Reviews and Reporting

Best practice guidelines on self-regulation advise that regular monitoring for compliance with rules should be undertaken to ensure the scheme is achieving its identified objectives. The scheme should also provide for regular reviews of the rules to ensure they are relevant in light of changing circumstances or expectations,

159 Advertising Standards Bureau, *How to Complain*, above n 30.

160 AANA, *Advertising Self Regulation: the Facts, the Figures, the Future* (1997) 13 cited in Portrayal of Women Advisory Committee, *The Portrayal of Women in Outdoor Advertising Report* (2002) 16.

161 Advertising Standards Bureau, *Review of Operations 2005*, above n 121.

162 Harker, Harker and Volkov, ‘Developing Effective Advertising Self-Regulation in Australia: Reflections on the Old and New Systems’, above n 69.

163 Kerr and Moran, above n 151, 199.

164 Hoek and Maubach, above n 45, 144.

165 Blakeney and Barnes, above n 60, 148.

166 Hoek and Maubach, above n 45, 145.

and to identify any systemic problems that are occurring.¹⁶⁷ The scheme should report on its operations, complaints, and the outcomes of monitoring and reviews, to instil credibility and consumer confidence in the scheme.¹⁶⁸ External audits of the scheme's administration should also be conducted to ensure accountability.¹⁶⁹

As noted above, the Bureau does not pre-vet or monitor advertisements for compliance with the AANA codes, beyond receiving complaints. As discussed, this is problematic because the scheme does not provide effective sanctions to ensure compliance. Although nearly all advertisers comply with Board directions to withdraw or modify advertisements, by the time this occurs advertisements may already have run for some weeks, exposing many children to potential harm.

In light of advertisers' increasing use of 'new media' and new forms of marketing to children, regular reviews of the Food Code will be necessary to ensure it is relevant and effective. However, the Code does not provide for periodic review of its performance. The AANA has undertaken internal reviews of other codes intermittently, and recently engaged public relations consultants to undertake an 'external review' of its Code for Advertising to Children.¹⁷⁰ But as Harker points out, undertaking internal reviews when pressured is unlikely to confer the same benefits to credibility and consumer confidence as a specified commitment to periodic external review.¹⁷¹ Nor is this likely to ensure the Food Code keeps pace with changing circumstances.

In recent years, the Bureau has improved its level of reporting, and thus accountability. All Board decisions from 1998 onwards are now published on the Bureau website, as well as annual internal reviews of the Bureau's operations since 2004, which include reporting on the source, nature and outcome of complaints to the Board. Quarterly newsletters and *2007 Complaint Statistics* are also available.¹⁷² However, as noted, external audits of the Bureau and Board have not been undertaken.

V CONCLUSION

Food advertising to children is pervasive, and the preponderance of this advertising is for unhealthy food. Since food advertising influences children to desire, demand and consume advertised products, it poses risks to children's health. Children are incapable of resisting the negative influence of food advertising, and consequently need protection.

167 Australian Competition and Consumer Commission, above n 43; Taskforce on Industry Self-Regulation, above n 43; National Consumer Council, above n 43.

168 Ibid.

169 Harker, Harker and Volkov, 'Developing Effective Advertising Self-Regulation in Australia: Reflections on the Old and New Systems', above n 69.

170 AANA, 'Advertising to Children under Review' (Press Release, 17 April 2007).

171 Harker, 'Towards Effective Advertising Self-Regulation in Australia: The Seven Components', above n 69, 105.

172 Advertising Standards Bureau, *Advertising Standards Bureau*, above n 143.

Analysis of the Food Code and AANA self-regulatory framework shows that it is inadequate to protect children from the negative impact of food advertising. The Food Code may be effective to create a façade of responsible conduct, and thus to achieve advertisers' aim of deterring government intervention, but closer analysis reveals the Code is ineffective to protect the interests of children. The Code provisions dealing with food advertising directed to children are contrived to appear to address particularly inappropriate or exploitative practices. But the provisions are blunt, imprecise and narrow, and fail to impose any meaningful limits on promotional strategies that are effective and actually used to influence children to desire and consume unhealthy food. Nor do the provisions restrict the amount, timing or placement of food advertising directed to children, or the nature of the products that may be advertised. As a result, the Food Code is unlikely to have any practical impact on the nature, balance or volume of food advertising to which children are currently exposed, and will not curb the negative influence of food advertising on children.

Even if the Food Code provisions were capable of having this effect, the Code's coverage of different types of advertising is incomplete and uncertain, and the AANA has not yet publicised the Code to consumers. There are also deficiencies in the AANA framework: administration of the scheme is not independent of industry or representative of non-industry stakeholders; there are grounds for querying the objectivity, fairness and effectiveness of decision-making; decisions cannot be enforced; and the scheme does not provide for monitoring or sanctions to ensure compliance.

The source of many of these problems, and the major barrier to efficacy of the Food Code, is the conflict between food advertisers' interest in employing advertising practices that are effective to reinforce or increase sales of their products and the public interest in moderating or removing influences on children to consume unhealthy foods. Advertisers' only real incentive to self-regulate is to ensure that their ability to use effective advertising practices is not substantially limited. However, substantial restriction of these practices is required to effectively protect the interests of children.

This conflict of interest renders self-regulation without direct government involvement and oversight incapable of protecting children from the risks posed by food advertising. Advertisers' resistance to regulation that impedes 'advertising freedoms' is such that they are unlikely to ever voluntarily submit to or comply with effective restrictions of food advertising to children.

Children are a vulnerable audience, and serious health consequences are at stake. Therefore, government must impose, or at least oversee and mandate, effective regulation of food advertising to children. Further analysis is needed to determine the precise form such regulation should take.