



Review of the Australian Consumer Law

Invitation for Public Comment on Issues Paper March 2016

Obesity Policy Coalition's Submission

27 May 2016

1. Introduction

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

We are grateful for the opportunity to comment on Consumer Affairs Australia and New Zealand's issues paper on the review of the Australian Consumer Law (ACL). The OPC's primary interest is in improving the application and enforcement of the ACL in the area of marketing food and beverages, particularly to children.

The OPC has made numerous referrals to the Australian Competition and Consumer Commission (ACCC) under the ACL about misleading food labelling and the particular focus of the OPC is whether the ACL fulfils its role in protecting vulnerable consumers, namely children, from misleading or deceptive conduct and false or misleading representations by the food and beverage industries. The OPC sees this as a particularly significant role as it believes that the current scheme of regulation of marketing and advertising does not provide adequate protection for children.

2. Background

The problem of marketing of children's food products

The marketing of unhealthy children's food is an increasingly important issue in Australia and internationally. The National Health Survey for 2014-15 reports that 27.4% of children ages 5-17 are overweight or obese.¹ Obese children have a 25-50% chance of becoming obese adults, and this chance increases to 78% for older obese adolescents.² Obesity is a leading risk factor for chronic disease including cardiovascular disease, type 2 diabetes and some cancers.³ Diabetes is the fastest growing chronic condition in Australia, with an estimated 280 Australians developing diabetes every day.⁴

Poor diet has been found to be a significant health risk. A global study of the burden of disease has found that the two highest risk factors contributing to the burden of disease in Australia are unhealthy diet and a high body mass index.⁵ This is particularly troubling as the National Health Survey reports that the proportion of energy from discretionary foods for children aged 2-18 years was 38.5%.⁶ The Australian dietary guidelines describe discretionary food as the foods and drinks not necessary to provide the nutrients the body needs, but that may add variety. However, many of these are high in saturated fats, sugars, salt and/or alcohol, and are therefore described as energy dense.⁷

There is compelling evidence that food advertising influences children's food preferences, requests and consumption, and is a probable causal factor in weight gain and obesity.⁸ It also undermines healthy eating messages from parents, schools and government. This is of serious concern when over a quarter of Australian children are overweight and obese. Food

¹ Australian Bureau of Statistics, Australian Health Survey: First Results, 2014-2015

² A Must and R Strauss (1999) "Risks and consequences of childhood and adolescent obesity" 23(Supp2) *International Journal of Obesity Related Metabolic Disorder* 1999 S2-11

³ World Health Organization Obesity: preventing and managing the global epidemic, Report of a WHO consultation. Technical Report Series 894. Geneva, 2000.

⁴ Diabetes Australia Fast Facts <http://www.diabetesaustralia.com.au/Understanding-Diabetes/Diabetes-in-Australia/>

⁵ Global Burden of Disease Study 2010 Results 1990-2010, Seattle United States; Institute for Metrics and Evaluation (IHME), 2013.

⁶ Australian Bureau of Statistics, Australian Health Survey: First Results, 2011-2012

⁷ NHMRC 2013, *Australian Dietary Guidelines*, Canberra: National Health and Medical Research Council

⁸ G Cairns, K Angus and G Hastings, 'The extent, nature and effects of food promotion to children: A review of the evidence to December 2008] Geneva: World Health Organisation, 2009

advertising to children also raises serious ethical concerns, as children do not have the cognitive capacity to understand and resist the influence of advertising.⁹

The World Health Organisation (WHO), Australia's Preventative Health Taskforce and numerous public health groups and experts have urged the introduction of effective controls on unhealthy food advertising as part of a comprehensive approach to reducing the risks of poor diet and weight gain.¹⁰ Since 2010, the WHO has conclusively recognised that a relationship exists between children's exposure to unhealthy food advertising and harmful food behaviours and health outcomes. Systematic reviews of the evidence in Australia and internationally clearly demonstrate that unhealthy food advertising influences children's food preferences, requests and consumption and is a probable causal factor in weight gain and obesity.¹¹

Apart from advertising directed primarily to children, there are marketing campaigns directed at parents and carers suggesting which products they should purchase and highlighting particular nutritional content and health or other benefits. In an increasingly busy and complex world, parents are vulnerable to suggestions about how best to feed their children and are influenced in their decision-making by marketing. They need to be able to rely on the material available in determining their choices.

The value of food and liquor retailing in Australia grew by 4 per cent in 2012-13 to \$141.4 billion and the proportion of total household expenditure spent on food and beverages was 19.1%¹². As a consequence, the marketplace is highly competitive and there is huge investment in marketing, which includes packaging, labelling and all forms of advertising. The role of the ACL in protecting vulnerable consumers is vital in this marketplace, particularly as the OPC believes that the current scheme of regulation of marketing and advertising does not provide adequate protection.

ACCC and food marketing complaints

The role of the ACCC is to ensure that those in the food industry comply with relevant provisions of the ACL when marketing children's food. The provisions that are traditionally relied upon are the provisions of the ACL that relate to misleading or deceptive conduct and false or misleading representations. In the 10 years the OPC has been active in the sector it has referred 11 complaints to the ACCC. These complaints, almost without exception, related to foods that which were presented as healthy cereals and snack foods for children. The complaints asserted that either misleading claims were made about the contents or omissions made about the contents of the products. Parents who are trying to make the best

⁹ Kunkel D, Wilcox BL, Cantor J, Palmer E, Linn S & Dowrick P. Report of the APA Task Force on Advertising and Children. Washington DC: American Psychological Association, 2004, <<http://www.apa.org/releases/childrenads.pdf>

¹⁰ World Health Organization. Set of recommendations on the marketing of foods and non-alcoholic beverages to children. Geneva: World Health Organization, 2010. Available at http://whqlibdoc.who.int/publications/2010/9789241500210_eng.pdf ; Final report of the Preventative Health Taskforce (2009) Australia: the Healthiest Country by 2020, available at <http://www.preventativehealth.org.au/> ; MacKay S, Antonopoulos N, Martin J, Swinburn B. A comprehensive approach to protecting children from unhealthy food advertising. Obesity Policy Coalition, Melbourne, 2011, available at <http://www.opc.org.au/paper.aspx?ID=foodadvproposal&Type=policydocuments#.VQDp47ccSUK>

¹¹ Cairns et al, Systematic reviews of the evidence on the nature, extent and effects of food marketing to children. A retrospective summary (2013) 62 *Appetite* 209; Boyland E J and Halford J C G, Television advertising and branding: Effects of eating behaviour and food preferences in children (2013) 62 *Appetite* 236; Jennifer Harris et al, Priming Effects of Television Food Advertising on Eating Behavior (2009) 28(4) *Health Psychology* 404; G Cairns, K Angus and G Hastings, The extent, nature and effects of food promotion to children: A review of the evidence to December 2008, Geneva: World Health Organisation, 2009; G Hastings et al. Review of the research on the effects of food promotion to children (Final report), Prepared for the Food Standards Agency, 22 September 2003; B Kelly et al, Monitoring food and non-alcoholic beverage promotions to children (2013) 14 *Obesity Reviews* (Suppl 1) 59; Shin-Yi Chou, Inas Rashad and Michael Grossman, Fast-Food Restaurant Advertising on Television and Its Influence on Childhood Obesity (2005) 51 *Journal of Law and Economics* 599; B Kelly et al, Monitoring food and non-alcoholic beverage promotions to children (2013) 14 *Obesity Reviews* (Suppl 1) 59. Institute for Health Metrics and Evaluation, Global Burden of Disease Country Profile data for Australia (2014), available at www.healthmetricsandevaluation.org

¹² Australian Food Statistics, Australian Department of Agriculture, available at agriculture.gov.au

decisions for their children's health need to be in a position to rely on the material presented to them. It is vital that the ACCC protects the consumer and ensures that the food industry is required to promote their foods in a manner which does not mislead.

Current regulation of food marketing

Labelling of food is currently regulated by the Australian and New Zealand Food Standards Code (the Code). The Code imposes significant labelling requirements and conditions on making nutrition content and health claims. The Code does not regulate all claims that are found on food packaging, only certain descriptions of food. For instance, a product must satisfy specific criteria before it may be labelled "good source of dietary fibre" or "low in salt". However, claims such as "natural", "nutritious", "healthy" and many others are not regulated by the Code. This is why the role of the ACL is vital in ensuring that false or misleading claims about food are investigated, to protect those vulnerable to such claims, including children and those who purchase food for children.

There is a vast amount of food advertising to children on television in Australia, most of which is for unhealthy products.¹³ Food advertisers also frequently target children with integrated campaigns that run across a range of channels, including children's magazines, websites, outdoor media, direct mail, digital engagement, email and food packaging.¹⁴ Promotional techniques used by food companies to target children include offers of 'premiums' with products, such as free toys and competitions, endorsements by popular children's personalities or characters, 'tie-in' promotions of products with children's films 'advergames' (computer games) on food company websites, and children's clubs on food company websites.¹⁵ Leading advertisers spend millions on advertising, with McDonald's, Nestle and Mars spending \$74.1m, \$59.4m and \$32.9m respectively in 2013.¹⁶

Despite the significant amount of marketing of children's products, there is no specific government regulation of unhealthy food advertising to children in Australia. The Children's Television Standards are the only government regulations dealing with advertising to children. They only apply to advertising on free-to-air television during "P" and "C" classified children's programs and not during periods when most children watch television. Food advertising to children through other media is self-regulated by the food and advertising industries under voluntary codes. These codes do not apply to higher rating programs that children may watch, do not cover all forms of promotion, do not apply to all food advertisers, and contain unclear and inadequate nutrition criteria. As a result these codes are ineffective for reducing children's exposure to unhealthy food advertising. Further these codes do not cover food labelling, packaging or marketing aimed at adults who are purchasing food for children, or that is aimed at both adults and children. These are the areas where the ACCC has taken enforcement action.

¹³ Kelly B, Chapman K, King L, Hebden L. Trends in food advertising to children on free-to-air television in Australia. *Australian and New Zealand Journal of Public Health* 2011; 35(2): 131-134

¹⁴ For more information, see the OPC's Policy Briefs on [Food Advertising to Children](#) and [Advertising unhealthy products to children through advergames, online activities, apps and social media.](#)

¹⁵ *Ibid*

¹⁶ Australia's Top Advertisers. *Ad News*, 21 March 2014.

3. Recommendations

ACCC should pursue more complaints about food marketing to children

This submission supports the ACCC's pursuit of both misleading or deceptive conduct and false or misleading representation claims against food and beverage companies marketing unhealthy products designed for children and encourages the ACCC to exercise its discretion and give its compliance and enforcement priority to these cases.

The OPC submits that it is particularly important for the ACCC to take action to prevent misleading, false or deceptive marketing in the food and beverage industries because of its broader public health consequences. This type of marketing has the potential to confuse consumers as they try and interpret information and to undermine public health messages about healthy eating, and negatively affect consumers' health. Promoting consumption of fresh fruit and vegetables, and avoidance of foods high in fat, sugar or salt, are important public health strategies, which aim to improve diets and assist prevention of obesity and chronic disease. The ACCC should prioritise investigative and enforcement action to ensure that these strategies are not undermined by marketing that creates misleading impressions about the content or health benefits of food and beverage products, particularly when the products are high in fat, sugar or salt. We believe there is scope for the ACCC to address some of the problems with this marketing by more actively enforcing the ACL in relation to misleading marketing practices of food companies, particularly misleading claims about the content of products, and selective promotion of products' nutritional contents to create misleading overall impressions of healthiness.

In doing this, the ACCC would be acting in accordance with one of the core purposes of the *Competition and Consumer Law Act 2010* which is to provide consumers with protection in their dealings with business. The ACCC Compliance and Enforcement Policy 2016 sets out factors to be considered by the ACCC in determining which complaints to give compliance and enforcement priority. Application of these priorities would support the prioritisation of complaints concerning food marketing particularly aimed at children. These include factors such as whether the "conduct detrimentally affecting disadvantaged or vulnerable consumer groups" and "where the ACCC action is likely to have a worthwhile educative or deterrent effect".¹⁷

The ACCC enforcement and compliance policy states¹⁸ that it is unlikely to pursue matters which are more appropriately resolved under an industry code of practice. The OPC's belief that the current advertising industry practices are inadequate to protect children, strengthens the argument for the ACCC considering more complaints about food marketing to children.

In 2006, the ACCC acknowledged the importance of the application of the Trade Practices Act (as it then was) to food industry representations by producing food descriptor guidelines for the food industry. The guide states that preventing and remedying misleading and deceptive representations about food and beverages is part of the ACCC's role to monitor and enforce compliance with the Act.¹⁹ It provides practical guidance on how the legislation has been applied to representations about food. The OPC recommends that the ACCC continue to provide guidance and clarity to consumers and industry on the application of the ACL to food industry representations by updating the 2006 guidelines.

¹⁷ 2016 ACCC Compliance Policy, (February 2016), p2

¹⁸ *ibid*

¹⁹ ¹⁹ Food and Beverage Industry- Food Descriptor Guidelines to the Trade Practices Act, ACCC, (November, 2006)

Increase amount of financial penalties

The maximum penalty for breach of the ACL is currently \$220,000 for an individual and \$1.1 million for a company. It is recommended that the maximum fines payable be increased substantially to a level that would have a significant impact on transnational companies. The increased penalties would thereby act as an effective deterrent rather than a reasonable cost of doing business.

Types of ACL remedies and penalties

Under the current *Competition and Consumer Act 2010* a finding of misleading or deceptive conduct does not allow for a criminal penalty or a civil penalty against the company in breach. It is recommended that such a finding attract the same penalties as a finding of other breaches of the ACL, including false and misleading representation.

4. Conclusion

We thank the CAANZ for the opportunity to comment on its Issues paper. While we recognise that food marketing to children is not a focus of this review, we strongly believe that the ACL has a crucial role to play in regulating children's exposure to misleading, false and deceptive marketing. While marketing restrictions alone will not halt or reverse the rise in childhood obesity and overweight in Australia, the evidence is clear that they will be an essential component to any multi-strategy approach capable of improving diets and reducing the impacts of childhood overweight and obesity in Australia.

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