

Industry self-regulation of food and beverage advertising to children

ACMA monitoring report

DECEMBER 2011

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Executive summary

In September 2009, the Australian Communications and Media Authority (the ACMA) announced its decision to monitor industry self-regulation of food and beverage advertising to children on free-to-air commercial television.

The decision arose from the ACMA's review of the Children's Television Standards (CTS) during 2007–09. A key area of community concern flagged in that review was the regulation of food and beverage advertising to children. Some submitters to the review urged the ACMA to 'ban' all or some of this advertising with a view to curbing the rising levels of childhood obesity.

At the end of 2008, the Australian Food and Grocery Council (AFGC) and the quick-service restaurant Industry (QSR) announced their initiatives on responsible advertising to children. The AFGC's *Responsible Children's Marketing Initiative* (RCMI) commenced on 1 January 2009, and the QSR's *Initiative for Responsible Advertising and Marketing to Children* (QSRI) on 1 August 2009. The RCMI is at Appendix 1 and the QSRI is at Appendix 2.

In response, the ACMA undertook to:

... monitor these initiatives ... [to assist it] ... in determining if industry can adequately address community concern without the need for additional government regulation.

This report firstly identifies the community concerns:

- > outlined in the community's submissions provided during the CTS review
- > contained in submissions made to the ACMA by the Obesity Policy Coalition (OPC) and Cancer Council NSW (CCNSW) in 2010
- > flagged in submissions from industry and in industry reports.¹

The report then considers various Advertising Standards Board (ASB) complaint case reports against the initiatives, for the period from 1 January 2009 to 31 May 2011. This provides a 'snapshot' of the first two years of the operation of the industry initiatives and highlights some areas where community concerns and industry initiatives are imperfectly aligned.

The report also considers three research studies on the impact of the initiatives. These are:

- > the University of Sydney's peer-reviewed research (in conjunction with Cancer Council NSW) on rates of food and beverage advertising by AFGC companies in the Sydney market across four days in 2009
- > the AFGC's own compliance monitoring reporting, which used three months of food and beverage advertising data from five major capital cities in 2010
- > the University of Sydney's peer-reviewed research (in conjunction with Cancer Council NSW) on rates of fast food advertising by quick-service restaurants in the Sydney market across four days in 2010.

¹ The AFGC provided submissions to the ACMA at the end of 2010. The ACMA has also referred to the AFGC's Compliance Report 2010 and Activity Report, 2010. Both reports are available at www.afgc.org.au/industry-codes/advertising-kids/rcmi-reports-2009.html

At this stage it appears to the ACMA that:

- > the community concerns flagged with the ACMA in 2007–09 remain
- > industry initiatives have not yet addressed all these community concerns
- > any real-life change in the level of children’s exposure to food and beverage advertising on free-to-air television is unclear.

The report also notes the recent establishment of the Australian National Preventive Health Agency (the ANPHA) by the *Australian National Preventive Health Agency Act 2010* (the ANPHA Act). The ANPHA is responsible for preventive health programs, and for effectively monitoring, evaluating and building evidence on preventive health strategies.²

The marketing of food with low nutritional value to children is a priority action area for ANPHA. The issue has been identified as a priority in the *Strategic Plan 2011–2015* and in the *Operational Plan 2011–2012*. Specifically, the strategic plan states that ANPHA will ‘monitor and engage with industry and other partners on food products and marketing, including products for children and marketing to which they are exposed with attention to energy-dense, nutrient-poor foods and beverages’ (p. 18).³

The ACMA welcomes this development. As a broadcasting regulator, the ACMA is neither equipped nor resourced to make independent judgments on issues of public and preventive health. The ANPHA—with its preventive health focus, health expertise and remit to evaluate and build evidence—is ideally placed to inform and promote a whole-of-government response which is likely to be required in responding to the challenges of childhood overweight and obesity. However, the ACMA will work collaboratively with the ANPHA where appropriate.

² Section 2A(2)(a) of the ANPHA Act.

³ Available at www.anpha.gov.au/internet/anpha/publishing.nsf/Content/strategic-plan - 26 October 2011.

1. Background to the ACMA's monitoring

The regulatory framework

Advertising to children on commercial television is subject to various forms of regulation including direct government regulation, co-regulation and voluntary self-regulation.

Direct government regulation is through the *Broadcasting Services Act 1992* (the BSA), which gives the ACMA the power to determine standards for children's programs.

The CTS require each licensee to broadcast at least 260 hours of children's (C) material and at least 130 hours of preschool (P) material in each year (CTS 8(3)). The CTS also provide safeguards during designated children's viewing times on free-to-air commercial television. Part 3 prohibits advertising during pre-school programming periods, as well as certain advertising techniques during children's programming periods.

Compliance with the CTS is a licence condition that applies to all Australian free-to-air commercial television broadcasters.⁴

Co-regulation is through the Commercial Television Industry Code of Practice 2010 (the code). The code is registered with the ACMA and all commercial television broadcasting licensees must comply with it. Complaints about non-compliance are made to the licensee in the first instance, and a person who is not satisfied with the licensee's response may complain to the ACMA.

The code extends the application of parts of the CTS to advertisements shown outside children's and pre-school programming periods and requires, for example, that food and beverage advertisements directed to children should not encourage or promote an inactive lifestyle and unhealthy eating or drinking habits, and must not contain any misleading or incorrect information about the nutritional value of the product.⁵ In addition, the code requires that all commercials and community service announcements directed to children must exercise special care and judgement and comply with CTS provisions on advertising content.⁶

Self-regulation is by **voluntary** agreement by participating companies to comply with the Australian Association of National Advertiser's codes (the AANA codes) and the RCMI or QSRI.⁷ The voluntary nature of such agreements means that complaints about the operation of the AANA codes and industry initiatives are not subject to government investigation or enforcement.

The RCMI commenced on 1 January 2009 and there are currently 17 signatories to this initiative.⁸

⁴ Clause 7(1)(b) of Schedule 2 of the BSA.

⁵ *ibid.*

⁶ Clauses 6.20 and 6.21 of the Commercial Television Code.

⁷ These codes include the AANA Code of Ethics, AANA Code for Marketing and Advertising Communications to Children, AANA Food and Beverages: Advertising and Marketing Communications Code.

⁸ The AFGC signatory companies are listed at Appendix 3.

The QSRI commenced on 1 August 2009. There are currently seven individual signatory companies belonging to four company groups. These include: McDonald's, Yum! Restaurants International (comprising KFC and Pizza Hut), Hungry Jack's and Chicken Treat (comprising Oporto, Red Rooster and Chicken Treat).

The AFGC manages the RCMI and has recently taken over the management of the QSRI.⁹

Complaints about food and beverage advertisements are made to the ASB which administers the complaints process for the RCMI and the QSRI, as well as the AANA codes.

⁹ AFGC, submission to the ACMA, November 2010, p. 4.

Addressing community concerns

Identifying community concerns

The CTS review (2007–09)

In 2007, the ACMA commenced its review of the CTS 2005 to ensure the continued relevance and effectiveness of the CTS.

The ACMA invited public comment and received 76 community submissions—59 addressed the issue of food and beverage advertising to children on television and 40 of these supported stronger regulation. In addition to these submissions, more than 20,000 postcards were received as part of the ‘Pull the Plug’ campaign organised by the Coalition against Food Advertising to Children (CFAC) and supported by the Cancer Council (NSW).

In 2008, the ACMA released a draft Children’s Television Standard and again invited public comment—53 submissions were provided, 45 of which advocated stronger regulation of food and beverage advertising to children on television.

The submissions provided to the ACMA during the CTS review identified the following areas of concern:

- > the impact of childhood obesity on children’s health
- > the impact of food and beverage advertising on children’s food choices
- > the impact of advertising on parents—‘pester power’
- > the volume of food and beverage advertising to children
- > the range of techniques used in advertising to children
- > misleading representations of the health benefits of food products
- > the efficacy of industry self-regulation, including complaints mechanisms and scope.

Specific examples of community concerns and views on food and beverage advertising submitted to the ACMA during the CTS review are cited below, and categorised by the ACMA according to the issues raised by the concern:

The impact of childhood obesity on children’s health

- > ‘A quarter of Australian children are overweight or obese and recent studies show worsening trends over time’.¹⁰
- > Childhood overweight and obesity contribute to very serious health problems.
- > ‘Tooth decay is a major health concern linked to diet and is ‘Australia’s most expensive diet-related disease’.¹¹

The adverse impact of food and beverage advertising on children’s food choices

- > Children’s exposure to food and beverage advertising is associated with childhood obesity because food advertising adversely influences children’s dietary choices.

¹⁰ In its submission to the ACMA (2007), the Australian Society for the Study of Obesity (ASSO) described itself as a scientific 550-member organisation in Australian and New Zealand comprising medical practitioners, dieticians, scientists and other health care professionals who are interested in obesity research, treatment or public health initiatives directed at the prevention of obesity. ASSO is a constituent member of CFAC.

¹¹ Australian Dental Association Inc., submission, 2007, p. 2.

- > Food and beverage advertising affects parents through the ‘pester power’ of their children.
- > ‘The high volumes of unhealthy food advertising seen by children undermines parents’ efforts in promoting healthier eating habits for their children’.¹²
- > ‘It is unrealistic and impracticable to expect parents to exercise the necessary control, such as requiring televisions to be switched off at each advertisement.’¹³

The range of techniques used in advertising food and beverages to children

- > ‘There are high levels, and repetition of, food advertising during programs which have a popular appeal to children, and at times when a significant number of children are watching television’.¹⁴
- > ‘Food and beverage advertising uses premium offers and endorsements by popular characters, and associates unhealthy food products with fun and happiness to sell ‘unhealthy’ food and beverages’.¹⁵
- > ‘There are tie-in promotions with food and beverage advertising and popular children’s films’.¹⁶

Misleading representations of the health benefits of food products

- > ‘Advertisements use techniques which suggest, imply, or lead viewers to believe that processed products are the same as, or similar to, fruit and vegetables, or may provide the same or similar benefits as fruit or vegetables’.¹⁷
- > ‘There is a direct discrepancy between the recommended dietary guidelines for children and the ‘diet’ being advertised on television.’¹⁸

Industry self-regulation of food and beverage advertising to children

- > ‘Industry self-regulation has already been demonstrated to not work by the large volumes of unhealthy food advertisements currently shown on television to children’.¹⁹
- > ‘Industry self-regulation has not been relied upon for other important public health issues such as tobacco and alcohol control, and should not be relied on for children’s health’.²⁰
- > ‘It is imperative that any new standards apply to when children are watching, rather than the proportion of the audience that is made up by children ... regardless of whether parents are also viewing television at the same time, children must be protected from the possible harms of food advertising.’²¹

The volume of children’s exposure to food and beverage advertising

- > ‘Several studies have described the content of food advertisements in Australia as being predominantly for foods classified as ‘extras’ by the *Australian Guide to Healthy Eating*. This means that children and their families are bombarded with messages for foods that should only be eaten in small amounts’.²²

¹² Parent’s Jury, submission, 2007, p. 2.

¹³ Obesity Policy Coalition (OPC) submission, 2007, p. 12.

¹⁴ CFAC, submission, 2007, p. 30.

¹⁵ *ibid.*

¹⁶ *ibid.*

¹⁷ *ibid.*

¹⁸ NSW Centre for Overweight and Obesity (COO) submission 2007, p. 8.

¹⁹ OPC submission, 2007, p. 4.

²⁰ *ibid.*

²¹ CFAC submission, pp. 15 and 26.

²² North Coast Area Health Service submission 2007, p. 4.

In September 2009, the ACMA released its final report of the review, and decided not to impose additional regulation on food and beverage advertising to children on television. However, in its final report, the ACMA acknowledged the ‘considerable community concern in relation to [this] issue that [was] publicly expressed and submitted through the review process.’²³

House of Representatives report—inquiry into obesity (2009)

On 1 June 2009, the House of Representatives Standing Committee on Health and Ageing tabled its report on the inquiry into obesity.²⁴ On the issue of advertising, the Standing Committee considered that industry self-regulation may prove to be successful through the reduction of advertisements for unhealthy food products on television during children’s prime viewing times. However, should self-regulation prove unsuccessful, the committee supported more stringent federal government regulations on food advertising to children.

2010 submissions on the industry initiatives

Two key community organisations made submissions to the ACMA in raising specific concerns about the initiatives: the OPC and CCNSW.

The ACMA also sought submissions from each state government department of health, as well as the Commonwealth Department of Health and Ageing (DoHA).

The AFGC provided submissions on the initiatives, including an Activity Report which included a three-month data sample of food and beverage advertising to children on commercial television after the commencement of the RCMI.

Industry response to community concerns

In its submission to the ACMA, the AFGC stated, ‘the AFGC Board recognised that the industry must take action and work with a range of stakeholders to find a solution that is seen to be effective and enforceable, and that addresses the need of government, the community and industry’.²⁵

In response to community concern, industry implemented the two initiatives on responsible advertising to children.

The AFGC states the ‘RCMI provides a framework for food and beverage companies to help promote healthy dietary choices and lifestyles to Australian children’.²⁶ Similarly, the QSR initiative also sets out a common framework for quick service restaurant companies.²⁷

The AFGC states it is committed to further developing and strengthening these industry codes to address community concerns about the nature and extent of food and beverage advertising to children.²⁸

²³ ACMA Final report on the review of the Children’s Television Standards 2005, p. 5.

²⁴ Weighing it Up: Obesity in Australia, available at www.aph.gov.au/house/committee/haa/obesity/report.htm.

²⁵ AFGC submission to the ACMA, November 2010, p. 5.

²⁶ AFGC submission, p. 6.

²⁷ *ibid*

²⁸ AFGC submission to the ACMA, p. 9

The core principles of the initiatives

The core principle outlined in the AFGC's RCMI is:

Companies participating in this initiative will publicly commit to marketing communications to children under 12, only when it will further the goal of promoting healthy dietary choices and healthy lifestyles.

Each participant will develop an individual company action plan that outlines how they will meet the following core principles:

Advertising Messaging

Participants will not advertise food and beverage products to children under 12 in media unless:

1. those products represent healthy dietary choices, consistent with established scientific or Australian government standards

And

2. the advertising and/or marketing communication activities reference, or are in the context of, a healthy lifestyle, designed to appeal to the intended audience through messaging that encourages:

good dietary habits, consistent with established scientific or government criteria; physical activity.

The core principle outlined in the QSR's initiative is:

'4.1 Advertising and Marketing Messaging

Advertising or Marketing Communications to Children for food and/or beverages must:

(a) Represent healthier choices, as determined by a defined set of Nutrition Criteria for assessing children's meals (see Appendix 1); and/or

(b) Represent a healthy lifestyle, designed to appeal to the intended audience through messaging that encourages:

(i) healthier choices, as determined by a defined set of Nutrition Criteria for assessing children's meals (see Appendix 1); and

(ii) physical activity'.

Defining 'healthy' and 'healthier' dietary choices in food and beverage advertisements to children

The QSRI

The 'healthier dietary choice' required by the QSRI is determined by a defined set of Nutrition Criteria for assessing children's meals. The Nutrition Criteria are set out in the Appendix to the QSRI, which outlines the required meal composition, maximum energy levels and limits on nutrients that are of public health concern. This criterion is specifically concerned with 'children's meals' and does not refer to other quick-service restaurant meals such as 'family meals' that may be consumed by children.

The RCMI

The 'healthy dietary choices' required by the RCMI are those that are consistent with established scientific or Australian Government standards.

The RCMI does not define a set of nutrition criteria for assessing 'healthy dietary choices' Currently, there is no Australian set standard criteria for determining non-core foods. RCMI signatory companies nominate a number of nutritional criteria or government guidelines. Each signatory's nominated criterion is outlined in its individual Company Action Plan (CAP).²⁹

²⁹ The companies outline how they will meet the RCMI core principles. Companies may add to these minimum commitments.

The 17 AFGC signatory companies have nominated approximately 14 different criteria and guidelines. The companies have elected a variety of Australian guidelines or have chosen to develop their own criteria. Four signatory companies have not elected any criteria because they claim they do not advertise their products to children.

A list of the signatories' elected nutrition criteria and guidelines is provided at Appendix 3.

Community concerns about the volume of nutrition criteria under the RCMI

In its 2010 submission to the ACMA, the OPC outlined several concerns about the volume of nutrition criteria under the AFGC initiative and the impact on consumers. The OPC stated:³⁰

... The nutrition criteria differ significantly across the Company Action Plans and the detail of each criterion is not included ... With so many different criteria applying, and the difficulties consumers may face in identifying, accessing and understanding the relevant criteria, consumers are likely to have difficulty identifying whether an advertisement may be in breach and may be deterred from lodging a complaint.

A similar view was expressed by the original independent arbiter to the RCMI, Professor Bruce Neal, who resigned from this role.³¹ Professor Neal was quoted as saying 'the code [sic] was too complex for the public to understand, and unworkable'.³² Professor Neal commented on the number of nutritional standards under the AFGC, saying 'it was almost impossible for most people to understand and judge it as there is no national standard [on nutrition]'. Professor Neal also commented that '... the QSR is a great improvement but it is still an abject failure because of the times that are applicable to children and [the] advertising'.³³

In its submission to the ACMA, the AFGC stated that each AFGC signatory is required to specify the nutrition standards that will be applied to meet the core principles of the initiative. While the nutrition criteria may differ between signatories, the RCMI uses an outcomes-based approach. The criteria must align with established scientific or Australian Government standards and only products that are representative of healthy dietary choices may be advertised. The Company Action Plans are available on the AFGC website, along with further details.³⁴

The AFGC also stated that the scope of the RCMI does not simply cover peak television viewing times for children. Marketing communication activities are captured if the audience is predominantly children and/or the media or communication activities are clearly directed primarily to children.³⁵

³⁰ OPC submission 2010, p. 3.

³¹ The role of the independent arbiter is to determine if the advertised food or beverage product satisfies the nutritional requirement of a 'healthy' choice.

³² Julian Lee, 'Junk food codes fail, says doctor', *Sydney Morning Herald*, 10 September 2010, www.smh.com.au/business/media-and-marketing/junk-food-codes-fail-says-doctor-20100909-1536n.html, accessed 13 April 2011.

³³ *ibid.*

³⁴ AFGC submission to the ACMA, p. 6.

³⁵ *ibid.*

Scope of the initiatives—the meaning of an ‘advertising or marketing communication to children’

1. Advertising or marketing communications to children

The RCMI provides:

The scope of this initiative is based on the definitions of **Advertising or Marketing Communications to Children** and **Media**.

The RCMI’s definition of ‘media’ is:

Media means television, radio, print, cinema and third-party internet sites where the audience is predominantly children and/or having regard to the theme, visuals, and language used are directed primarily to children. In regards to television, this includes all P and C programs; all programs where more than 50% of the audience is children under 12 years; plus those G rated programs that meet the criteria above as being designed for children.

‘Advertising or marketing communications to children’ is defined as:

... advertising or marketing communications which, having regard to the theme, visuals and language used, are directed primarily to Children and are for food and/or beverage products.

The quick service restaurant industry has also imported this definition of ‘advertising or marketing communications to children’ in to the QSR initiative.

Industry’s rationale for the scope of the initiatives

In its media release on the Senate’s dismissal of the Greens’ Bill on junk food advertising in March 2011, the AFGC stated:³⁶

Banning advertising of [high fat salt sugar] food products during times when families are watching television together should not be imposed in Australia because it’s a ‘family choice’ issue.

But when children are watching television alone without supervision is a different matter – during these programs, industry does have a responsibility to advertise healthy food.

Some AFGC signatories demonstrate this scope in their CAPs. For example, in its ‘Statement of Company Commitment’, Ferrero states it is ‘preferable to avoid directing advertising to children when they are most likely exposed to commercial communications without parental supervision’.³⁷

Kraft Foods Pty Ltd also provides a similar rationale in its CAP:

We will continue to advertise our full portfolio of products in media seen principally by parents and all-family audiences.³⁸

2. Commercial television advertising techniques prohibited by the initiatives

The RCMI and the QSRI both prohibit the following advertising techniques, which apply to free-to-air commercial television:

- > product placement in program or editorial content of any medium directed primarily to children
- > popular personalities and licensed characters

³⁶ *ibid.*

³⁷ Ferrero Company Action Plan, www.afgc.org.au/industry-codes/advertising-kids/company-action-plans.html.

³⁸ Kraft Company Action Plan, p. 1.

- > premium offers.

Other techniques that do not apply to commercial television advertisements are not identified here, but are outlined in the copy of the initiatives at appendixes 1 and 2.

Complaints about food and beverage advertisements to children

Complaints about advertisements (including those relating to food and beverage advertising to children) are made to the ASB. Complaints that allege a breach of the initiatives are assessed by the ASB on two levels:

- > whether the products represent a healthy [or healthier] choice
- > whether the advertisement and / or media in which the advertisement is placed is primarily directed to children.³⁹

Whether the products represent a healthy or healthier dietary choice

The determination of whether products represent a healthy choice is made by an independent arbiter.

The independent arbiter for the RCMI is the Nutritional Physiology Research Centre (University of South Australia). The arbiter for the QSRI is Dr Bruce Neal, George Institute for Global Health.⁴⁰

Whether the advertisement is directed primarily to children

The ASB determines whether the advertisement is directed primarily to children.

In case report ASB 429/10 (Nestle Allens lollies commercial, see case study 2 below), the ASB stated that it determines whether the advertising or marketing communication directly targets children according to the 'overall impact' of its visuals, language and themes, as well as the advertiser's stated intent. In that report, the ASB also stated that it interprets the meaning of 'primarily' according to its ordinary dictionary meaning—'in the first place'. The ASB Board stated 'for the advertisement to be within the RCMI, the Board must find the ad is aimed in the first instance at children'.

ASB determinations on commercial television food and beverage advertisements—case studies

The next section of this report uses case studies to show how key terms have been interpreted in selected ASB case reports.

1. *When is an advertising or marketing communication on commercial television 'directed primarily to children'?*

³⁹ AFGC, submission, p. 7.

⁴⁰ www.adstandards.com.au/process/theprocesssteps/specificproductsandissues/foodandbeverageadvertising, accessed 21 September 2011.

Case study 1—Kraft Oreo biscuits commercial television advertisement (ASB 363/10 and ASB 409/10)⁴¹

The advertisement

Two primary-school boys sit in a school playground with their lunch boxes on their laps. They play a game with an Oreo biscuit that involves twisting the biscuit to reveal the cream filling, whereby the boy who holds the half with the cream filling decides who the other boy will marry. One says, 'This time if the cream is on your side of the Oreo, you are going to have to marry Emily Stevens'. The other boy replies, 'OK, if the cream is on my side, you're going to marry Laura Fisher'. The boys twist the biscuit and both hold a biscuit half with cream filling. They slap hands and say, 'Both sides, bachelors!' Following this, a female student stands in front of the boys and smiles at them. The boys then suggest that they should 'twist again' as it was 'just a practice run'. The advertisement finishes with a visual display of a box of Oreos, accompanied by an adult voiceover that says, 'Only Oreo'.

> ASB 409/10 (appeal complaint determined on 22 September 2010—upheld)

The complaint

The complaint was an appeal of ASB determination 363/10 (25 August 2010), which found the advertisement was not directed primarily to children under the meaning of the AANA codes and 'the RCMI did not apply because the advertisement was not shown during programs with a significant child audience'.⁴² In the appeal complaint, the complainant provided a tracking report for the advertisement showing it was broadcast during programs designed to appeal to children (for example, *Dora the explorer*, *Shrek the Third*, *Go Diego! Go!*).

The advertiser's response

The advertiser acknowledged that Oreos biscuits do not meet Kraft's Sensible Solutions criteria: '... upon investigation of this complaint, we have identified that some bonus slots for the Oreo 'School Yard' TVC have inadvertently occurred during some children's viewing times.

The ASB's determination

The ASB determined the advertisement breached the first core principle of the RCMI '... on the basis that the product was not an appropriate product and that it had been advertised in children's programming ...'

The Board also considered whether the advertisement was directed primarily to children, concluding it was directed to adults:

For the purpose of the AANA Children's Code and the Food and Beverage Code the test that the Board must apply is whether or not the advertisement 'having regard to the theme, visuals and language used, are directed primarily to children ...'. The Board will consider the advertiser's stated intent but will also make an evaluation based on its own review of the advertising or marketing communication material and the product being promoted.

The Board ... must find that the advertisement is aimed in the first instance at children. The Board considered the theme of the advertisement (boys playing a schoolyard game at an age when boys don't like girls), the visuals (children playing in a playground) and the language (children talking in everyday terms with little voice over). The Board noted that depictions of children do not, by themselves, necessarily amount to an advertisement being attractive to or directed to children in the first instance. The Board considered that the advertisement was more likely to be taken as being directed to adults who can look back with amusement at school behaviour from young boys and girls. The Board agreed that the advertisement would be attractive to children but that it

⁴¹ These case reports are available on the [Advertising Standards Bureau's website](#).

⁴² Both Oreos advertisements were determined before the amendment of the RCMI Guidelines and therefore did not consider whether the advertisement itself was directed primarily to children.

is not, in the terms of the Children's Code, directed primarily at children.

However, the Board upheld the complaint (on appeal) on the basis that the advertisement was for a product that did not represent a healthy dietary choice and it had been broadcast during children's programming.

A stakeholder perspective on the Oreos determination

The OPC provided submissions to the ACMA on its concerns about the Oreos determinations and stated:⁴³

... [T]he meaning of 'directed primarily to children' has been interpreted very narrowly by the Board to exclude significant types or styles of advertising likely to appeal to, and reach large numbers of, children.

A second Kraft Oreos commercial television advertisement complaint (ASB 136/11)—upheld on 11 May 2011

This second breach of the RCMI also involved an advertisement depicting two small boys eating Oreos biscuits as they drink milk. The older boy dips his biscuit in his glass of milk and watches as the younger boy tries to combine his biscuit with his milk, but is unable to because his milk is in a cup with a lid. After hitting the lid with the biscuit, the young boy decides to pour the milk over the biscuit.

The advertiser stated the advertisement was 'designed for mum, this television commercial is a light-hearted portrayal of the way kids make games out of everyday objects and scenarios'. The advertiser also stated, 'The television commercial dramatises an innocent and natural part of childhood and that's what we are celebrating'. The ASB Board reiterated its views in ASB 363/10 and 409/10, and found the advertisement was primarily directed to adults. The Board stated the 'visuals, language and theme of this advertisement create an overall impact ... that is not specifically directed or designed to be clearly directed primarily to children'. Again, however, the Board upheld the complaint on the basis that the advertisement was shown during programs that were directed primarily to children.

Case study 2—Nestle Allens lollies commercial television advertisement (ASB 429/10—dismissed on 27 October 2010)⁴⁴

The advertisement

Children and adults are in a street setting where a giant doll walks, controlled by puppet strings. The doll is handed an oversized bag of Allens lollies. It dips a bubble-blower into the bag and blows lolly-shaped bubbles over the crowd. Some bubbles burst; others are caught and change into lollies. A child eats a lolly. The nursery song 'This old man' is whistled in the background. The ad's final image shows the Allens logo accompanied by the written text, 'Allens makes smiles'.

The complaint

The complainant alleged the advertisement breaches the RCMI because it advertises a product that does not meet 'healthy dietary choices' criteria, and it is directed primarily to children because it features a doll blowing bubbles and children catching and eating lollies, and includes a children's song ('This old man'). The complainant also alleged that the image of a doll giving away lollies and turning bubbles into lollies would appeal to children's sense of fantasy and imagination.

The advertiser's response

The advertiser stated:

⁴³ OPC, submission 2010, pp. 9–10.

⁴⁴ This case report is available on the [Advertising Standards Bureau's website](#).

‘...the context and content of the advertisement was created for its adult audience, specifically (a) to appeal to their sense of nostalgia; (b) to trigger for them happy memories of their childhood, reminding them of bright, happy, good times and of just being kids; and (c) to come across to them as being magical, a celebration and to capture the wonderment of a parade. It is in this context that an iconic children’s song of yesteryear was chosen for the advertisement’.

The advertiser stated it is ‘not a logical conclusion to assume that the depiction of children in an advertisement means it is directed to children’. The advertiser claimed the doll was selected as a timeless object that would appeal to adults who would relate it to their childhood, and not a modern-day children’s toy which would appeal to children. The advertiser applied this reasoning to the advertisement’s nursery song, ‘This old man’.

The ASB’s determination

The ASB determined the advertisement was directed primarily to adults, not children. The Board noted:

... the advertiser’s response that the intent of the advertisement was to create a nostalgic scene which would remind adults of their childhoods. The Board considered that the use of the doll, instead of a more up to date child’s toy, and the choice of an old-fashioned nursery rhyme, indicated that the advertisement was directed more towards adults than towards children.

On balance, the Board considered that the visuals, language and theme of this advertisement create an overall impact of this advertisement that is not specifically directed or designed to be clearly directly primarily appealing to children. The Board considered that the advertisement was more likely to be taken as being primarily directed to adults. The Board agreed that the advertisement would be of considerable attraction to children but that it is not, in the terms of the AFGC RCMI, clearly directed primarily to children.

Although the Board considered the advertisement was directed to adults, it considered the lollies ‘a product that is targeted to children and is of principal appeal to children (even though it will be consumed by adults and children)’.

Different perspectives on when food and beverage advertising targets children

In case studies 1 and 2, the complainant asserted the view that an advertisement that is attractive and appealing to children (particularly when children are depicted in the advertisement) is ‘directed primarily to children’.

Some community submissions made to the ACMA during the CTS review expressed a similar view. CHOICE proposed the following re-definition of the term ‘directed primarily to children’:

A broader definition of the term would be more appropriate. Alternatively, the term, ‘appealing to children’ would be more suitable as it would capture all advertisements that appeal to children, for example, because the product itself is aimed at children, the advertisement features children, or it uses techniques such as celebrities, characters and giveaways to appeal to children.⁴⁵

Under CHOICE’s approach, food and beverage advertisements that are highly appealing to children would be considered ‘directed towards children’.

⁴⁵ CHOICE submission 2007, p. 10.

The AFGC has also acknowledged the relevance of advertisements which are attractive to children. In its submission to the ACMA in November 2010, the AFGC stated 'the key to determining whether the media or communication activities are directed to children is whether the themes, visuals, language and concepts are those that are attractive to children under 12'.⁴⁶ The definition of 'marketing Communications and Media' on the AFGC's website at this time, also applied this approach.⁴⁷

The ASB Board quoted this approach in case study 2 (ASB429/10). However, the Board also stated:

'... that while useful in determining whether the advertisement is directed to children, the requirement is that the advertisement is 'clearly directed primarily' to children.'⁴⁸

Although the AFGC proposed that themes, visuals, language, and concepts that are attractive to children is the key to determining whether the advertisement is directed to children, case studies 1 and 2 reveal that the ASB does not consider an advertisement's attractiveness to children as the determinative factor of whether an advertisement (or the program in which it is shown) is directed primarily to children. In both case studies, the ASB Board interpreted whether the advertisement was 'directed primarily to children' according to whether it had a 'first instance' appeal to children.

The AFGC has subsequently stated that in March 2011, it amended the wording of the scope of when media or communication activities are directed to children to reflect the ASB's approach.⁴⁹

⁴⁶ AFGC submission to the ACMA, p. 6.

⁴⁷ www.afgc.org.au/industry-codes/advertising-kids/marketing-communications- a... - accessed by the ACMA on 10 December 2010.

⁴⁸ ASB439/10 at p.4.

⁴⁹ AFGC submission on draft report, 21 October 2011 at p. 12, and confirmed by email received by the ACMA 10 November 2011.

When are children under 12 years the predominant audience?

Case study 3—Mars advertisement (ASB 439/10—dismissed on 24 November 2010)

The advertisement

A group of young men play American football with an elderly woman who is depicted as 'Betty White'. The 'Betty White' character is given a Snickers bar after being tackled to the ground. After eating the Snickers bar, she transforms into a young man, who runs and joins the other players. The final image in the advertisement is the text, 'You are not you when you are hungry. SNICKERS really satisfies.'

The complaint

The complainant alleged the advertisement breached the RCMI because it is not a healthy dietary choice and the advertisement was shown during children's television programs, including *The Simpsons* and *Junior Masterchef*.

The complainant stated:

The Simpsons is a cartoon program that is directed primarily to children and is extremely popular among children younger than 12. According to recent viewing data (for metro audiences in five capital cities) *The Simpsons* is among the top 10 highest rating TV programs for children younger than 12.

The complainant stated:

Junior Masterchef is a children's cooking competition. It is specifically designed for and principally directed to children. According to television viewing data for metro audiences in five capital cities the first episode of *Junior Masterchef* was the highest rating program for children younger than 12 (between 22 August and 18 September 2010) with 417 000 children under 12 in the metro audience ... Clearly these programs are "media" according to the RCMI definition.

The advertiser's response

The advertiser provided a breakdown of the viewing profile of the two programs—*The Simpsons* (21 per cent under 12) and *Junior Masterchef* (16 per cent under 12). The advertiser submitted, '*The Simpsons* is not a children's program because its enduring success over the past 20 years has seen it transcend traditional animated viewing trends, and is now delivering [to] a mass audience ...' The advertiser submitted, '... whilst [*Junior Masterchef*] features children up to the age of 12 as the contestants, we anticipated (correctly) that *Junior Masterchef* viewing trends would follow a similar pattern to *Masterchef*, delivering a much older and broader audience'.

The ASB's determination

The Board noted 'that the advertised product Snickers Bars is not a healthier dietary choice. As a result the product cannot be advertised to children under 12 in "media"'. However, the Board noted:

... the programmes in which the advertisement appears are programmes that are directed to adults and families and are not programmes which are primarily directed to children or likely to have predominantly child audiences ...

In particular, the Board noted ... that *Junior Masterchef* was the most popular programme currently showing among 5–12 year olds. Despite its popularity with children, however, the program does not have an audience of 'predominantly' children. The Board also noted that although [*The Simpsons*] has a child viewing audience of around 28 per cent under 12s, is not a programme with an audience of predominantly children and is not primarily directed to children under 12.

Statistical data on audience populations

The Mars case study provides an example of an advertisement for a chocolate bar (Snickers) shown during television programs whose audience contained a significant amount of children below 12 years, but did not satisfy the statistical requirement of more than 50 per cent of children under 12 in the total viewing audience.

OzTAM data on audience measures for the top programming events in 2009 demonstrates the significant number of children who may be exposed to food and beverage advertising during popular programs. For example, *Masterchef Australia – the winner announced* was the top-ranking program in 2009. It had a viewing audience of 441,000 in the 0–14 age group, which was an audience share of 73.8 per cent in this age group.

Day-part viewing data sourced from 2006 demonstrates that children's television viewing times do not exclusively fall during 'children's programs', and that large numbers of children under 14 years of age view programs outside 'children's programs'. For example, children in the 0–14 years age group averaged more than 400,000 from 6.00 pm to 9.00 pm, and this peaked at 492,000 during the 7.00 pm to 8.00 pm viewing period.⁵⁰

This data indicates that a significant amount of children's exposure to food and beverage advertisements is outside C and P programming periods under the CTS.

Complaints alleging breaches of the initiatives—ASB determinations

As at 31 May 2011, the ASB had published on its website 31 free-to-air commercial television case reports on complaints determined against the RCMI and QSRI.⁵¹ All of these complaints alleged the advertisement was directed to children; however, no complaint was upheld on this basis.⁵²

Table 1 identifies the numbers of upheld and dismissed complaints in these 31 commercial television determinations between 1 January 2009 and 31 May 2011.

⁵⁰ ACMA, *Children's viewing patterns on commercial, free-to-air and subscription television: report analysing audience and ratings data for 2001, 2005 and 2006, May 2007*, p. 4, www.acma.gov.au/webwr/_assets/main/lib310132/childrens_viewing_patterns.pdf.

⁵¹ This figure is based on published ASB determinations available on the [ASB website](#). This figure does not include case reports determined against the initiatives for other forms of media (for example, billboard and internet advertisements) or ASB determinations on complaints about food and beverage advertising to children that were solely considered against the AANA codes (for example, complaints on promotion of bullying, false nutrition claims, misleading and untruthful advertising).

⁵² The upheld complaints were on the basis the advertisement was shown during program that were directed to children. Two QSR complaints were upheld on the basis the advertisement promoted a food product that did not satisfy the nutritional criteria under the QSR.

Table 1 Upheld and dismissed complaints between 1 January 2009 and 31 May 2011

Initiative	Upheld	Dismissed
RCMI	4 ⁵³ (shown during programs directed to children)	11 ⁵⁴
QSRI	2 ⁵⁵ (use of popular/licensed characters)	15 ⁵⁶
Subtotal	6	26
Total	32	

These figures indicate that the ASB upheld approximately 20 per cent of these complaints.

Industry comments on ASB breach findings

In its 2010 Compliance Report, the AFGC commented on the breaches of the RCMI and stated that non-compliance was primarily due to food and beverage advertisements being inadvertently shown during children’s programs in bonus air time slots.⁵⁷

Similarly, in its comments on its external audit (March to May 2010) the AFGC also provided this explanation for product placement during bonus time slots and stated this ‘indicates that further communication with the television networks is required’.⁵⁸

In its compliance report, the AFGC also outlined steps taken by signatories to ensure media placement schedules comply with the RCMI. For example, Campbell Arnotts and Simplot conduct briefings for new marketers; and Kraft Foods states that advertising material is reviewed by their Corporate and Legal Affairs team.⁵⁹

⁵³ These determinations are ASB409/10, ASB407/10, ASB482/10, ASB136/11

⁵⁴ These determinations are ASB493/10, ASB439/10, ASB441/10, ASB443/10, ASB438/10, ASB429/10, ASB363/10, ASB195/10, ASB204/10, ASB442/10, 514/10.

⁵⁵ These determinations are ASB573/09, ASB32/10.

⁵⁶ These determinations are ASB495/10, ASB498/10, ASB499/10, ASB430/10, ASB431/10, ASB224/10, ASB571/09, ASB 52/11, ASB81/11, ASB53/11, ASB54/11, ASB84/11, ASB91/11, ASB104/11, ASB423/10.

⁵⁷ AFGC RCMI 2010 Compliance Report, p 17

⁵⁸ AFGC RCMI 2010 Compliance Report, p 15.

⁵⁹ AFGC RCMI 2010 Compliance Report, p 13.

4. Research on rates of food and beverage advertising on commercial television since the start of the RCMI and QSRI

The emerging research undertaken by health experts assists the ACMA in its monitoring of the industry initiatives.

The three main studies outlined in this report include research undertaken by the AFGC as well as the University of Sydney, in collaboration with Cancer Council NSW.

AFGC research—amount of commercial television food and beverage advertisements (March to May 2010)⁶⁰

Research methodology and data sampling

The AFGC obtained data on the number of food and beverage advertisements shown during March to May 2010 on commercial television in five major capital cities (Sydney, Melbourne, Brisbane, Adelaide and Perth). Ninety-two days of data on a 24-hour day were collected in real time as the advertisements were screened. There were approximately 80,000 occurrences over the 92 days.

The data excluded advertisements by quick service restaurants. All other food or beverage advertisements were classified as either 'advertising to children' or 'not advertising to children' according to the program in which they were screened. Advertisements were classified as 'advertising to children' if they were shown during programs classified as P (pre-school) and C (children's), where children were the predominant audience or where the program was determined to be directed at children.

The analysis focused on the number of individual advertisements and did not consider the frequency of the advertisement or whether the advertisement itself was directed to children.

Research findings—interpretation of data

The AFGC research found that that 2.4 per cent of the food and beverage advertisements broadcast during the sample time were advertisements of 'unhealthy' non-core foods that directly targeted children. The AFGC based this finding on the following data analysis:

- > 410 unique food and beverage advertisements were shown from March to May 2010.
- > 160 unique advertisements were shown in children's programs—only these advertisements were considered 'advertising to children'.
- > 33 of these 160 advertisements were for non-core food products.
- > 10 of the 33 advertisements directly targeted children.
- > The 10 advertisements identified as directly targeting children made up 2.4 per cent of the total number of unique advertisements (410).

⁶⁰ AFGC, Activity Report, December 2010, www.afgc.org.au/industry-codes/advertising-kids/rcmi-reports-2009.html, accessed 16 December 2010.

- > Of the 33 non-core foods advertised, 20 of these (61 per cent) were by signatory companies.

The ACMA's observations on the AFGC's research findings

Data sample and concluding figures

The AFGC's Activity Report states that the figure of 410 records the number of unique food and beverage advertisements, all of which ran multiple times (approximately 80,000 times in the relevant period). The report does not identify the total number of times advertisements for non-core foods were screened during the sample period.

Accordingly, the AFGC's concluding figure of 2.4 per cent does not reflect the frequency or volume of the advertisements broadcast or the potential level of exposure of audiences (including the child audience) to an individual advertisement. Nor is it, necessarily indicative of the volume of children's exposure to advertisements for 'unhealthy' non-core food product .

The report found that the majority of advertisements for non-core foods were by signatory companies (61 per cent).

The conceptualisation of 'advertisements directed to children'

The statistics recorded in the data sample reflect the number of advertisements that were conceptualised as 'advertising to children', according to whether they were shown during programs 'directed primarily to children' or programs where children are the predominant audience. This means all other food and beverage advertisements shown during the research period were excluded from the analysis. This approach potentially excluded some advertisements for food and beverages which were targeted to children.

The AFGC's analysis therefore describes the characteristics of a 'sample of [selected] advertisements over a given period of time', rather than a measure of potential exposure to an individual advertisement by a viewing audience.

The ACMA is of the view that including greater detail on the number of exposures of advertisements for 'unhealthy' non-core food and beverages may have provided a more complete view of advertisements for non-core foods broadcast in this sample period.

AFGC 2011 data analysis

The AFGC submitted that it had undertaken further analysis of the March–May 2010 advertising data used in its activity report, publication of which is pending. The AFGC further submitted that its analysis showed a reduction in the number of non-core food advertisements, based on seven days of data across three commercial free-to-air channels in 2007 and four days in 2009. Once the AFGC's further analysis has been peer reviewed and published, it may offer additional insights into the effectiveness of the RCMI.

University of Sydney—research on rates of advertising by AFGC signatory and non-signatory companies⁶¹

This research study was conducted by the University of Sydney, Prevention Research Collaboration, and Cancer Council NSW. It was published under the title 'Industry self regulation of television food advertising: Responsible or responsive?' It monitored food and beverage advertisements from 16 to 19 May 2009.

⁶¹ L. King et al., 'Industry self regulation of television food advertising: Responsible or responsive?', *International Journal of Pediatric Obesity*, Early Online, 2010, pp.1–9.

This research was subject to international peer review.

The purpose of the research was to evaluate the impact of the RCMI. The study compared patterns of food advertising on commercial free-to-air television in Sydney by AFGC signatories and non-signatories in 2009, 2007 and 2006.

Research methodology and data sampling

The research sample recorded all advertisements broadcast on three Sydney commercial free-to-air (FTA) channels in the following periods:

- > 14–20 May 2006—6.00 am to 11:00 pm
- > 13–19 May 2007—6.00 am to 11.00 pm
- > 16–19 May 2009—6.30 am to 10.30 pm.

The advertisements were coded as healthy/core foods, unhealthy/non-core foods and other/miscellaneous.

The AFGC signatory companies were identified in the May 2009 data (post RCMI). The advertising techniques used in the advertisements were also coded and included promotional characters, premium offers and nutrient content claims.

Research findings—interpretation of data

- > The overall rate of food and beverage advertising on Sydney commercial FTA television during the sample period fell following the introduction of the RCMI. However, the rate of non-core food and beverage advertising remained stable.

There was a 35 per cent decrease in the rate of all food advertising in 2009 compared with 2007 (controlling for the type of day, there was no significant change in the rate of all food advertising from 2006 to 2007). The average number of food advertisements per hour decreased from 7.0 in 2007 to 5.9 in 2009.

In 2009, there were 181 non-core food advertisements that used at least one persuasive advertising technique; 62 per cent of these were by AFGC signatory companies.

Despite the reduction in overall food advertisements, there was no statistically significant change in advertising rates for any of the food categories (non-core foods were advertised at a rate of an average of 3.7 per hour in 2006, 3.4 per hour in 2007 and 3.2 per hour in 2009).

- > AFGC signatory companies accounted for 41 per cent of non-core food advertising. Of the 41 companies advertising food products in 2009, 14 were AFGC signatories. Of the 36 companies advertising non-core foods in 2009, 11 were AFGC signatories.

The majority of all food advertisements in 2009 continued to be for non-core foods. AFGC companies appear to be over-represented in advertising non-core foods because they accounted for about one-third of the food companies advertising in 2009 but 41 per cent of non-core food advertising.

However, the study found that AFGC signatory companies advertising on the three commercial free-to-air television channels in Sydney reduced their rate of non-core food advertising from an average of 1.7 per hour in 2007 to 1.3 in 2009. While the study found a reduction during children's peak viewing times (from 1.8 per hour to 1.5 per hour), during these times the average rate of non-core food advertising was slightly higher than the overall trend.

University of Sydney—research on rates of advertising by QSRI signatory and non-signatory companies⁶²

This research study by the University of Sydney, and Cancer Council NSW, was published under the title ‘Advertising of fast food to children on Australian television: the impact of industry self-regulation’. It monitored food and beverage advertisements from 16 to 19 May 2009 and 17 to 20 April 2010. This research was subject to international peer review.

The objective of the research was to ‘assess the impact of the quick-service restaurant industry’s self-regulative initiative on fast-food advertising to children on Australian commercial television’.⁶³

Research methodology and sampling of data

The research sample recorded all advertisements broadcast on three Sydney commercial free-to-air (FTA) channels in the following periods:

- > 16–19 May 2009—6.30 am to 10.30 pm
- > 17–20 April 2010—6.00 am to 11.00 pm.

The advertisements were coded by food type and included the categories core (healthy) foods, non-core (unhealthy) foods, miscellaneous foods and fast foods. The ‘fast foods’ category was also coded into three subcategories—those promoting healthier alternatives, non-core foods or other (where, for example, only the company name of the brand was advertised). Each fast-food advertisement was further coded by company, whether the company was a QSRI signatory and the focus of the advertisement (for example, single product, meal, multiple products or company brand).

The statistical analysis included the number of advertisements during each sample period, with a separate analysis according to the food category. Non-core fast-food advertisements were further analysed for all times and during children’s peak viewing times.⁶⁴

Research findings —interpretation of data

- > Differences in the rates of food advertising in May 2009 and April 2010:

The mean frequency of total food advertisements increased significantly from 6.0 per hour in 2009 to 6.3 per hour in 2010. Changes in food advertising also varied across food categories—the rate of non-core food advertisements decreased (from a mean frequency of 2.0 in 2009 to 1.4 in 2010); however, advertising for miscellaneous foods increased (from a mean frequency of 1.4 in 2009 to 1.9 in 2010).

The overall rate of total non-core food advertising (including non-core fast foods) decreased from a mean frequency of 3.1 to 2.4 advertisements per hour.

From 2009 to 2010, the rate of total fast-food advertisements increased significantly (mean frequency rose from 1.1 in 2009 to 1.5 in 2010). However, the frequency of advertisements for non-core fast foods remained the same and this was also the case during children’s peak viewing times.

⁶² L. Hebden et al., ‘Advertising of fast food to children on Australian television: the impact of industry self-regulation’, *Medical Journal of Australia*, 2011, vol. 19, no. 1, pp. 20–24.

⁶³ L. Hebden et al., Abstract at p. 20.

⁶⁴ Peak viewing times were defined as times when the child audience exceeded 25 per cent of the maximum child audience for the day, and included 5.30 pm to 10.30 pm on weekdays; and 7.30 am to 11.00 am and 4.30 pm to 11.00 pm on weekends (note 50 at 21).

> Advertising by QSRI signatory companies:

In 2009, non-core fast-food advertisements comprised 93 per cent of total fast-food advertising, compared with 67 per cent in 2010. However, the research found a significant interaction between company type and changes in advertising for non-core fast foods between 2009 and 2010, whereby non-signatory companies reduced their rate of non-core fast-food advertising relative to all fast-food advertising by 84 per cent, while signatory companies reduced their rate by only 17 per cent.

> Advertising for children's meals by fast-food companies:

Of the seven fast-food meals advertised in 2010, four were classified as a 'children's meal', with three of these advertised for a family and one for a child only. This was based on who was depicted consuming the meal in the advertisement. According to the research study's estimated energy requirements measure for children, only the child-specific meal complied with the QSRI nutrition criteria. The advertisements for the family meals (which also depicted children consuming the meal) exceeded children's daily energy requirements by 30 per cent, based on the assumption that a quarter of a family meal is available to children. These meals comprised non-core foods made up of burgers, fried foods and soft drinks.

The ACMA's observations on the findings in the University of Sydney/NSWCC research studies

Both data samples indicate some reductions in the rate of food and beverage advertising on commercial television. However, they also show that non-signatory and signatory companies continue to advertise unhealthy food and beverage products and fast-food meals. The research into food and beverage advertising by AFGC companies also found that there was no reduction in the rate of non-core food advertising by all AFGC companies.

In both University of Sydney research studies, the researcher acknowledged a limitation in the data sample used—the short broadcast period. The studies do not provide a comprehensive picture of television advertising across all major Australian cities and across different times of year. This affects the conclusions that can be drawn on whether the industry initiatives adequately address community concerns about levels of food and beverage advertising.

However, the figures are comparative across three time periods in the 2010 study and two time periods in the 2011 study, and indicate changes in advertising rates associated with the commencement of the RCMI and the QSRI.

Given these observations, the ACMA considers the indications revealed by this data do not provide a sufficient evidence base on which to determine whether the initiatives have affected the rate of food and beverage advertising on commercial free-to-air television in Australia.

5. Observations on the self-regulatory framework

Community awareness of industry initiatives

The community's awareness of and access to the complaints system is a significant element of effective self-regulation.

AFGC and QSRI signatory website audit

Availability of initiatives and CAPs on signatory company websites

The AFGC is the peak body for AFGC companies and displays the CAPs of RCMI signatory companies on its website.⁶⁵ The AFGC also publishes reports on the RCMI and CAPs on its website. For example, the AFGC's 2010 RCMI Compliance Report outlines signatories' compliance with the RCMI and signatory reporting during 2010.⁶⁶

The QSRI and QSR Company Action Plans are available on the AANA website.⁶⁷

The ACMA conducted a search of the websites of the AFGC and QSRI signatory companies on 8 April 2011. It searched each company's home page and site map, as well as Google to find out where the CAPs are available. While all AFGC signatories included information on nutrition on their websites on this date, very few provided easily accessible links to their CAP. In most cases, locating the CAP on 8 April 2011 required a detailed search of the site map, or a Google search to locate a link to the CAP or information on responsible marketing to children.⁶⁸

Similarly, few QSR participants provide easily accessible links to their CAP and QSRI on their website.⁶⁹ This may impact on the community's awareness of the initiatives.

Industry reporting and communication with the community

The AFGC states it 'has been actively promoting the RCMI since its inception, through media releases and presentations to various audiences, including representatives from government and non-government organisations and general consumers.'⁷⁰

The complaints scheme—access and process

Stakeholders' perspective on the complaints process

Both the OPC and CCNSW expressed concern about the operation of the complaint scheme administered by the ASB. These concerns centred on the following areas:

- > Accessibility of the complaints system—identifying whether the company is a member of the AFGC or QSR, and whether they are a signatory to the RCMI or QSRI Plan.

⁶⁵ www.afgc.org.au/industry-codes/advertising-kids.html, accessed 8 December 2010.

⁶⁶ www.afgc.org.au/industry-codes/advertising-kids/rcmi-reports-2009.html

⁶⁷ www.aana.com.au/QuickServiceRestaurantInitiative.htm accessed 7 November 2011.

⁶⁸ Signatories with links to their CAP on their website include Campbell Arnott's, CPW, Mars, Simplot, PepsiCo, Nestle. Sanitarium discusses its commitment to responsible advertising to children but does not provide a link to its CAP. The ACMA found only two QSRI signatory companies had direct links to their CAPs on their website (McDonald's and KFC). The CAPs of the other five QSR companies were located through a general Google search.

⁶⁹ McDonald's CAP is available at mcdonalds.com.au/about-us/responsibility, accessed 8 April 2011; KFC's is available at www.kfc.com.au/nutrition/responsible-advertising.asp, accessed 7 April 2011.

⁷⁰ AFGC submission to the ACMA, p. 6.

- > Complexity of the self-regulatory regime—a complainant would need to be aware of the industry codes, the relevant CAPs and, potentially, a number of different criteria against which nutritional value are assessed.
- > Variations in the terminology and provisions of the initiatives and codes—the RCMI defines children as under 12, the QSR11 defines children as under 14, and the AANA codes define children as 14 and under.
- > Multiple complaints—the ASB considers multiple complaints about the one advertisement as one ‘case report’.
- > Level of resources required for the preparation of a complaint—the OPC commented that the review mechanism is expensive and the cost of obtaining the necessary resources to demonstrate a breach can be prohibitive—for example, the cost of copies of advertising and tracking reports recording when advertisements were shown.
- > Limits in sanctions for breaches—there are very limited consequences for breaches and the current system relies on voluntary compliance. The ASB does not have the power to force an advertiser to comply even where a breach finding is made.

Industry comments on the complaints-process

The AFGC states that detailed information on the RCMI is available on the AFGC website, which includes the process for making a complaint to the Advertising Standards Bureau.⁷¹

The ASB Board meets twice a month to consider complaints received and can also meet between meetings if the Secretariat considers that a complaint should be considered as a matter of urgency.⁷² The AFGC states that this allows complaints against the RCMI and the QSRI to be dealt with in a timely manner.⁷³

In its 2010 Compliance Report, the AFGC listed the food and beverage advertising complaints assessed by the ASB during 2010. The AFGC distinguished ‘direct’ complaints (where the complainant directly mentions the RCMI) and ‘indirect’ complaints (where the complainant does not mention the RCMI, but the ASB assesses the complaint against the RCMI core principles if it relates to the appropriateness of food and beverage advertising).⁷⁴

On this basis, the AFGC states that the ASB assesses complaints about food and beverage advertisements against all the codes they administer, regardless of whether the complaint mentions the specific initiatives.⁷⁵ The AFGC contends that this practice ensures even greater accountability to signatories to the RCMI and QSRI.⁷⁶

ASB website audit

The ACMA conducted an audit of the ASB’s website to assess the on-line complaints scheme. The ASB website displays the initiatives and the AANA codes. It also provides the online complaints process—the online complaint form is accessed after the completion of a questionnaire (six questions), which directs the user to alternative complaints bodies if their complaint does not concern the content of an advertisement.⁷⁷

⁷¹ AFGC submission to the ACMA, p. 6.

⁷² AFGC submission to the ACMA, p. 7.

⁷³ *ibid*

⁷⁴ AFGC RCMI 2010 Compliance Report, 2011, p. 16

⁷⁵ AFGC submission, p. 7.

⁷⁶ *ibid*.

⁷⁷ www.adstandards.com.au/advertisingstandards/codesweadminister, accessed 4 April 2011.

The ASB displays its case reports on its website at www.adstandards.com.au/casereports/determinations.

Sanctions for breaches of the AANA codes and industry initiatives

When a company is found in breach of the RCMI, QSRI or AANA codes, the ASB will ask them to modify or discontinue the advertising or marketing communication, and to advise the ASB whether it agrees to modify or discontinue this communication. Under the AANA codes, the advertiser is given five days from the ASB's notification of its breach determination to modify or discontinue the advertisement.

The ASB's website states:

Advertisers can choose to modify the advertisement to remove the offending element(s) that led to the Board's determination to uphold the complaint(s). During this time, the advertisement must be removed.⁷⁸

If the advertiser does not respond by withdrawing or modifying the advertisement, the ASB and the AANA may refer the case report to the appropriate government agency, comment on the advertiser's lack of response in the case report, or forward the case report to media proprietors.

There is no financial penalty for breaches of the industry initiatives or AANA codes.

Case study 4—Hungry Jack's (ASB 573/09 and ASB 32/10)

The advertisements

Both advertisements promoted a Hungry Jack's kids meal comprising three chicken nuggets, a bottle of water and a toy. In the first advertisement, the toys depicted characters from *SpongeBob Squarepants*. In the second, the toys depicted characters from *The Simpsons*. In both advertisements, a voiceover invited the viewer to buy the meal to 'get the toy'.

The complaints

In both complaints, the complainant alleged the advertisement breached the QSRI because it promoted an unhealthy product, included popular/licensed characters, and promoted fun toys for children to collect that were more than incidental to the meal. The complainant also invited the ASB to reconsider the meaning of premium offer applied by the AANA codes in previous complaints, in the context of the initiative.

The advertiser's response to the complaints

For both complaints, the advertiser did not deny that the advertisement promoted a food product that 'did not fully comply with the nutritional requirements set-out by the QSR'. In the first complaint, the advertiser argued the QSRI came into effect during the promotion of this product and Hungry Jack's attempted to modify the product to meet those requirements. In the second complaint, the advertiser claimed it had considerably modified the advertisement by reducing the amount of time and exposure dedicated to the toy.

The ASB's determinations

The ASB Board referred to the advice of the independent arbiter, Professor Bruce Neal, and found the advertisements promoted a product that did not meet the nutritional criteria set out in the QSR initiative. In both complaints, the Board determined that the advertisements breached the core principles of the QSRI on the basis that the meal did not meet the QSRI's nutritional criteria. Consequently, the advertisements also breached the provision relating to the use of licensed characters

⁷⁸ www.adstandards.com.au/advertiserknowhow/aftertheboarddecision, accessed 8 March 2011.

since the food product did not comply with Article 4.1.

However, in both complaints, the ASB Board considered the toy included in the Kids Club meal was not a premium offer because it was integral to the product rather than in addition to it.

The advertiser's response to the determination

The advertiser stated at the conclusion of both complaints that the advertisement 'will not be rescheduled at any stage in the future'.

A stakeholder perspective on the Hungry Jack's complaint and sanctions under self-regulation

In its submission to the ACMA, the OPC made the following comments on the breaches of the QSRI in ASB 573/09 and ASB 32/10:

... none of [the Hungry Jack's] Kids Club Meal combinations met the nutrition criteria (developed by the QSRI signatories), so it used the combination that came closest to complying. Knowing that this meal failed to comply with the criteria, it used the combination again in the advertisement featuring *The Simpsons* broadcast in January 2010 and simply claimed, yet again, that an alternative meal that met the criteria was still not available.⁷⁹ Given the QSRI had been effective since 1 August 2009, Hungry Jack's had more than a reasonable period of time to understand its obligations and ensure compliance ... we believe that Hungry Jack's has ignored its obligations under the QSRI due to the lack of any real deterrence or sanctions for breaches.'

The OPC also provided the following general concerns about sanctions under industry self-regulation:⁸⁰

In the event that the Board upholds a complaint under the AANA or food industry codes there are very limited consequences for the advertiser. The Board ... has no power to force an advertiser to comply with its request: the system relies entirely on voluntary compliance by advertisers. No other sanctions apply.

... by the time a complaint is submitted, and a determination is made, a period of up to 9 weeks is likely to have passed since the advertisement was broadcast. ... Even if an advertisement is withdrawn as a result of an ASB determination (or complaint), the time that will have passed means that any damaging impact on children will have already occurred.

As a consequence of the lack of effective deterrents for breaches, we are concerned that neither the AFGC or signatories to the QSRI are committed to complying with their codes.

In each of the Hungry Jack's case studies outlined above, the QSRI signatory company stated it advertised a product that it knew did not comply with the nutritional criteria set out by the QSRI. In the second Hungry Jack's case, the advertiser acknowledged that it was 'aware that the meal did not meet the criteria however an alternative was still not available'. In both cases, the advertisement had completed its run before the ASB's breach determination.

⁷⁹ ASB Case No. 32/10 (10 February 2010).

⁸⁰ OPC, 2010 submission, pp. 14–16.

The ACMA's observations on industry coverage

The initiatives (and AANA codes) are voluntary, which limits their coverage to advertising by companies who elect to be signatories to their respective industry's initiative.

The AFGC states that the current 17 signatories to the RCMI in aggregate have a very large proportion of the market share in their categories, and particularly in 'non-core' food products. The AFGC states it will continue to encourage food and beverage manufacturing companies to sign up to the initiative.⁸¹

Industry achievements

Indications of a reduction in the rates of advertising for non-core foods

The University of Sydney research studies provide analysis of sample data that suggests a reduction in the rate of non-core food advertising on commercial free-to-air television in the Sydney market since the commencement of the industry initiatives.

In the AFGC's *Interim Report 2009*, the AFGC noted that 10 signatories did not advertise to children, while six advertised in accordance with the RCMI principles.⁸² One signatory has instructed networks that no bonus airtime may fall in 'family movies'. In addition, five signatories reformulated some of their food products to meet healthy choices and two took action to change their marketing strategies so they comply with the RCMI.

The initiatives do attempt to cover television viewing periods that are not limited to particular times (for example, the requirement of the C or P periods under the CTS). This is demonstrated by the various conditions in which an advertisement may be captured, including when the content of the advertisement for an unhealthy food product is directed at children, regardless of the time the advertisement is shown.

Modification of food and beverage products

The AFGC's Interim report also noted other activities undertaken by signatories to reduce portion sizes or sugar content of some products, including:⁸³

- > Nestlé launched new products with less sugar content and more fruit content.
- > Kraft introduced a new Vegemite product that contains 65 per cent less fat than original product combined with butter, and reiterated that its Philadelphia Cream Cheese product has light and extra light varieties.
- > Mars reduced portion sizes in its chocolate bar products.
- > George Weston Foods undertook to reduce salt levels across its Tip Top bread range.

⁸¹ AFGC 2010 RCMI Compliance Report, p. 18.

⁸² www.afgc.org.au/industry-codes/advertising-kids/rcmi-reports-2009.html, accessed 12 January 2011.

⁸³ 2009 RCMI Interim Report, p 7 available at - www.afgc.org.au/industry-codes/advertising-kids/rcmi-reports-2009.html

- > Cadbury participated in the 'Be Treatwise' campaign and changed its packaging to reiterate that its products are treats, and should only be consumed in moderation.⁸⁴

The ACMA also identified actions outlined in signatories' 2009 CAP reports. These include:

- > Cadbury Pty Ltd indicated that while it did not use its 'Freddo' character to advertise any particular products or food, it did use the character on its website.
- > Nestle Australia Limited stated that some interactive games on product websites had been decommissioned.

⁸⁴ Kraft Foods purchased Cadbury in early 2010 and Cadbury's Action Plan was subsequently incorporated into Kraft foods (AFGC Compliance Report 2010, p. 6).

6. Food and beverage advertising—looking forward

Whole-of-government

A national preventative health approach

Preventative Health Taskforce report

In April 2008, the Minister for Health and Ageing, the Hon. Nicola Roxon, MP, announced the National Preventative Health Taskforce (PHT). This taskforce was set up to develop strategies to tackle the health challenges caused by tobacco, alcohol and obesity.

The PHT released a discussion paper, *Australia: the healthiest country by 2020*, as well as associated technical papers on obesity, tobacco and alcohol. These formed the basis for public consultations and informed the PHT's final report, which was released in September 2009.

The report made recommendations on how to address the issue of food advertising to children, which included:

- > Phasing out the marketing of energy-dense nutrient-poor (EDNP) food and beverages on free-to-air television and Pay TV before 9.00 pm within four years.
- > Phasing out premium offers, toys, competitions and the use of promotional characters, including celebrities and cartoon characters, to market EDNP food and drink to children across all media sources.
- > Developing and adopting an appropriate set of definitions and criteria for determining EDNP food and beverages.

Government response to the PHT report

In May 2010, the government released the report, *Taking Preventative Action, A Response to Australia: The Healthiest Country By 2020*, which outlined its response to the PHT's recommendations on food and beverage advertising to children. The recommendations included the following:

- > Develop a set of national nutritional criteria

In the report's Recommended Key Action Area 5, the government committed to 'reduce exposure of children and others to marketing, advertising, promotion and sponsorship of energy-dense nutrient-poor foods and beverages'.⁸⁵ Under this key action area, the government proposed the development and adoption of an appropriate set of definitions and criteria for determining EDNP food and drink.⁸⁶

- > Monitor the impact of the initiatives on responsible advertising to children

The government also committed to 'continue to monitor the impact of the industry initiatives to ensure their effectiveness in reducing children's exposure to advertising of EDNP foods and beverages'.⁸⁷

⁸⁵ Recommended Key Action Area 5, *Taking Preventative Action, A response to Australia: the healthiest country by 2020*, p. 46, www.health.gov.au/internet/preventativehealth/publishing.nsf/Content/taking-preventative-action, accessed 11 April 2011.

⁸⁶ *ibid.*

⁸⁷ *Taking Preventative Action*, p. 47.

The report also refers to the establishment of the Australian National Preventive Health Agency (ANPHA) in response to the emerging preventative health challenges.⁸⁸ The report describes the ANPHA as the first 'national agency dedicated to preventative health [and] will play a role in gathering, analysing and disseminating the available evidence and evidence-based programs'.⁸⁹

Recommended Key Action Area 10 also refers to the government's funding of the DoHA's review of national nutrition recommendations.⁹⁰

The government also noted that PHT recognised that the evidence for intervention in relation to obesity was 'more variable than in other public health issues such as tobacco control' and that its obesity recommendations 'emphasise that any regulatory strategies need to be addressed in a staged approach, which allows for self and co-regulation to have time to work and for their effectiveness to be monitored'.⁹¹

Australian National Preventive Health Agency (ANPHA)

The *Australian National Preventive Health Agency Act 2010* (ANPHA Act) was passed in November 2010, and the agency commenced operation on 1 January 2011.

The ANPHA will take responsibility for a number of programs, including the national social marketing programs relating to obesity.⁹²

Among other things, the purpose of the ANPHA is to:

- > advise on, lead and be a catalyst for national preventive health programs
- > effectively monitor, evaluate and build evidence on preventive health strategies⁹³
- > facilitate a national health prevention research infrastructure.⁹⁴

The government acknowledged that, in establishing the ANPHA, the agency would provide leadership, research, evaluation and policy advisory capacity to guide the national preventive health agenda. In addition, the government stated:

Comprehensive approaches, such as those used on smoking, have been found to be the most effective in producing preventative health outcomes.⁹⁵

Department of Broadband, Communications and the Digital Economy— Convergence Review

In 2011, the Australian Government announced that it would conduct a Convergence Review in response to ongoing trends in technology and communications that have reshaped the media landscape since the current media and communications regulatory frameworks were established.

The review involves a comprehensive examination of Australia's communications and media regulation. It includes a review committee that will look at Australia's communications and media legislation, and advise the government on amendments to ensure an effective framework for emerging communications and media platforms.

⁸⁸ Taking Preventative Action, p. 6.

⁸⁹ Taking Preventative Action, p. 7.

⁹⁰ Taking Preventative Action, p. 59.

⁹¹ Taking preventative Action, p.34.

⁹² www.health.gov.au/internet/main/publishing.nsf/content/phd-anpha, accessed 11 April 2011.

⁹³ Section 2A(2)(a) of the ANPHA Act.

⁹⁴ Section 2A(2)(b) of the ANPHA Act.

⁹⁵ Taking Preventative Action, p. 9.

The final terms of reference for this review were announced on 2 March 2011 and cover, among other things, how policy adequately reflects community standards and the views and expectations of the Australian public.⁹⁶

Industry

In its 2010 Compliance Report, Industry stated that it is 'willing to support government in their review of industry-led initiatives'.⁹⁷ The AFGC stated, 'ongoing monitoring of marketing communication activities against the RCMI core principles and during children's viewing periods is important to determine the extent of the current situation, changes over time, and identify any improvements required to the RCMI'.⁹⁸

The AFGC outlined its own future work in terms of the RCMI and stated it is 'working to further develop the reporting and monitoring framework based on lessons learnt from the first year of implementation'.⁹⁹ Future work will also focus on streamlining the management of the RCMI and the QSRI.¹⁰⁰

In 2012, an independent review of the RCMI will be undertaken to assess the overall structure and functions of the initiative, including the continued relevance of the core principles.¹⁰¹

The AFGC will continue to monitor the extent of food and beverage advertising to children over the same three-month period each year to track change over time.¹⁰²

⁹⁶ www.dbcde.gov.au/digital_economy/convergence_review#terms accessed 13 April 2011.

⁹⁷ AFGC 2010 RCMI Compliance Report, p. 18.

⁹⁸ *ibid.*

⁹⁹ AFGC, submission to the ACMA, p. 9.

¹⁰⁰ *ibid.*

¹⁰¹ *ibid.*

¹⁰² AFGC Activity Report, p. 11.

7. Conclusions

The ACMA has monitored the progress of the RCMI and QSRI in addressing community concerns around food and beverage advertising to children on free-to-air television.

This monitoring report identifies:

- > ongoing community concerns in this area
- > differing views on the adequacy of the scope of the initiatives. In particular, the OPC (among others) is critical of the fact that the initiatives deal only with:
 - > marketing directly targeting children (rather than also capturing marketing that appeals to children)
 - > programs directed to or watched predominantly by children (rather than also capturing programs with a significant child audience)
- > early research offering an initial snapshot of the real-world impact of the initiatives.

Taking into consideration the limited research on the effectiveness of the industry initiatives, the limited evidence of the benefits of restricting food and beverage advertising and the absence of national standard nutrition criteria, the ACMA will not be moving to develop new television standards on food and beverage advertising to children.

The ACMA will continue to investigate complaints about advertisements during children's programs, including food and beverage advertisements. However, the ACMA does not propose to conduct further monitoring of the RCMI and QSRI initiatives.

The government has established the ANPHA to play a key leadership role in preventive health, research, evaluation and policy advice to tackle obesity. The ACMA acknowledges its limited expertise and jurisdiction in matters associated with tackling childhood overweight and obesity, and welcomes the expertise and leadership of the ANPHA in this area.