

SELF-REGULATION OF FOOD ADVERTISING TO CHILDREN: AN EFFECTIVE TOOL FOR IMPROVING THE FOOD MARKETING ENVIRONMENT?

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Australia has high rates of childhood obesity, with approximately a quarter of Australian children being overweight or obese. While a range of factors contributes to weight gain, health and consumer advocates have raised concerns about the effect of unhealthy food advertising on children's diets. In 2008 the Australian food industry responded to these concerns by introducing two voluntary codes on food marketing to children. This paper examines whether the codes establish the building blocks of an effective self-regulatory regime, in light of research suggesting that the initiatives have not significantly reduced children's exposure to unhealthy food marketing. The paper finds that the substantive terms of the codes contain a number of loopholes, and that regulatory processes lack transparency and accountability. Further, revisions to the codes have done little to improve their operation or to expand their reach. Drawing upon the theory of responsive regulation, the paper concludes by setting out a phased regulatory strategy that aims to strengthen government leadership in food industry self-regulation, with the objective of protecting children more effectively from exposure to unhealthy food marketing.

I INTRODUCTION

In Australia, approximately a quarter of children are obese or overweight, representing a 50 per cent increase from 25 years ago.¹ Increases in childhood obesity may have slowed, but the prevalence remains high,² particularly among children in lower socioeconomic groups.³ Obesity increases children's risk of a range of health problems, including elevated blood pressure and insulin resistance, as well as the likelihood of psychosocial problems such as low self-esteem and bullying.⁴ As importantly, excess weight in childhood is linked to

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1 Timothy P Gill et al, 'Childhood Obesity in Australia Remains a Widespread Health Concern that Warrants Population-Wide Prevention Programs' (2009) 190 *Medical Journal of Australia* 146, 146.

2 Ibid.

3 Jennifer A O'Dea, 'Differences in Overweight and Obesity among Australian Schoolchildren of Low and Middle/High Socioeconomic Status' (2003) 179 *Medical Journal of Australia* 63.

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

obesity and overweight in adults, and associated non-communicable diseases (“NCDs”) such as diabetes and heart disease.⁵ NCDs are Australia’s leading cause of illness, disability, and death,⁶ and obesity and overweight account for an estimated \$21 billion in direct costs and \$35.6 billion in government subsidies per year.⁷ If left unchecked, childhood obesity could create a substantial burden on the Australian healthcare system and on future economic productivity, once the current generation of children progresses into adulthood.⁸

Obesity is caused by a complex interplay of factors, including individual biological mechanisms, physical activity levels and dietary intake, peer and family influences, and the broader social, economic, and cultural factors that determine access to income and education.⁹ Evidence suggests that food marketing also makes a small but significant contribution to childhood obesity.¹⁰ Food companies use a range of media platforms and marketing techniques to target children and adolescents,¹¹ including television advertising, celebrity promotions, and, increasingly, marketing embedded in digital media, such as in-

- 5 Shumei S Guo et al, ‘The Predictive Value of Childhood Body Mass Index Values for Overweight at Age 35 y’ (1994) 59 *American Journal of Clinical Nutrition* 810, 810; Ian D Caterson, ‘The Weight Debate: What Should We Do About Overweight and Obesity?’ (1999) 171 *Medical Journal of Australia* 599, 599; World Health Organisation (“WHO”), ‘Obesity: Preventing and Managing the Global Epidemic’ (WHO Technical Report Series No 894, WHO, 2000) 50 <http://www.who.int/nutrition/publications/obesity/WHO_TRS_894/en/>; A M Magarey et al, ‘Predicting Obesity in Early Adulthood from Childhood and Parental Obesity’ (2003) 27 *International Journal of Obesity* 505, 505.
- 6 Australian Institute of Health and Welfare, ‘Australia’s Health 2014’ (Australia’s Health Series No 14 Cat No AUS 178, Australian Institute of Health and Welfare, 2014) 94 <<http://www.aihw.gov.au/australias-health/2014/>>.
- 7 Stephen Colagiuri et al, ‘The Cost of Overweight and Obesity in Australia’ (2010) 192 *Medical Journal of Australia* 260, 260.
- 8 See, eg, PwC, ‘Weighing the Cost of Obesity: A Case for Action’ (PwC, October 2015) 4–5 <<http://www.pwc.com.au/pdf/weighing-the-cost-of-obesity-final.pdf>>.
- 9 Garry Egger and Boyd Swinburn, ‘An “Ecological” Approach to the Obesity Pandemic’ (1997) 315 *BMJ* 477; Sara Gable and Susan Lutz, ‘Household, Parent, and Child Contributions to Childhood Obesity’ (2000) 49 *Family Relations* 293; Jennifer A O’Dea, ‘Gender, Ethnicity, Culture and Social Class Influences on Childhood Obesity among Australian Schoolchildren: Implications for Treatment, Prevention and Community Education’ (2008) 16 *Health and Social Care in the Community* 282.
- 10 See, eg, J Michael McGinnis, Jennifer Gootman and Vivica I Kraak (eds), *Food Marketing to Children and Youth: Threat or Opportunity?* (National Academies Press, 2006); Georgina Cairns, Kathryn Angus and Gerard Hastings, ‘The Extent, Nature and Effects of Food Promotion to Children: A Review of the Evidence to December 2008’ (Review, WHO, December 2009) <http://www.who.int/dietphysicalactivity/publications/marketing_evidence_2009/en/>; Georgina 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.
- 11 See, eg, Cairns, Angus and Hastings, above n 10; Susan Linn and Courtney L Novosat, ‘Calories for Sale: Food Marketing to Children in the Twenty-First Century’ (2008) 615 *Annals of the American Academy of Political and Social Science* 133, 136–46; Lana Hebden, Lesley King and Bridget Kelly, ‘Art of Persuasion: An Analysis of Techniques Used to Market Foods to Children’ (2011) 47 *Journal of Paediatrics and Child Health* 776.

game advertising.¹² The vast majority of these advertisements are for unhealthy products such as sugar-sweetened cereals, soft drinks, confectionery, savoury snacks, and fast food.¹³ The food industry argues that there is no evidence of a causal link between obesity and food marketing.¹⁴ However, systematic reviews find moderate to strong evidence that such advertising influences children's food preferences, purchase requests, and actual consumption habits (independent of other factors),¹⁵ leading public health experts to conclude that exposure to unhealthy food marketing is a modifiable risk factor for obesity. Advertising to children also raises ethical concerns, as children under eight years of age lack the cognitive capacity to understand the persuasive intent of advertising.¹⁶

Health and consumer advocates have grown increasingly concerned about unhealthy food marketing to children, and call for stronger, statutory restrictions on promotions for unhealthy products.¹⁷ The World Health Organisation has also called on member states to adopt national measures that aim to reduce children's exposure to unhealthy food marketing and has released guidance for the design and implementation of effective regulatory measures.¹⁸ However, the primary approach taken by governments is to encourage the food industry to self-regulate.¹⁹ In response, the industry has introduced national 'pledges' on

- 12 See Kathryn C Montgomery and Jeff Chester, 'Interactive Food and Beverage Marketing: Targeting Adolescents in the Digital Age' (2009) 45 *Journal of Adolescent Health* S18; Becky Freeman et al, 'Digital Junk: Food and Beverage Marketing on Facebook' (2014) 104(12) *American Journal of Public Health* e56.
- 13 See, eg, Cairns, Angus and Hastings, above n 10, 15; Cairns et al, above n 10, 212.
- 14 See Corinna Hawkes, 'Marketing Food to Children: The Global Regulatory Environment' (Report, WHO, 2004) 1 <<http://apps.who.int/iris/bitstream/10665/42937/1/9241591579.pdf>>; Australian Food and Grocery Council ('AFGC'), 'Food and Beverage Advertising to Children: Activity Report' (Report, AFGC, May 2012) 4.
- 15 See McGinnis, Gootman and Kraak, above n 10; Cairns, Angus and Hastings, above n 10; Cairns et al, above n 10; Gerard Hastings et al, 'The Extent, Nature and Effects of Food Promotion to Children: A Review of the Evidence' (Technical Paper, WHO, July 2006) 24–33 <http://apps.who.int/iris/bitstream/10665/43627/1/9789241595247_eng.pdf>.
- 16 Brian L Wilcox et al, 'Report of the APA Task Force on Advertising and Children' (Report, American Psychological Association, 20 February 2004) 5–6 <<http://www.apa.org/pubs/info/reports/advertising-children.aspx>>.
- 17 See, eg, Boyd Swinburn et al, 'The "Sydney Principles" for Reducing the Commercial Promotion of Foods and Beverages to Children' (2008) 11 *Public Health Nutrition* 881; International Association for the Study of Obesity ('IASO'), Consumers International ('CI') and International Obesity Task Force ('IOTF'), 'Recommendations for an International Code on Marketing of Foods and Non-Alcoholic Beverages to Children' (Recommendations, IASO, CI, IOT, March 2008) <http://www.worldobesity.org/site_media/uploads/ConsumersInternationalMarketingCode.pdf>; CI, 'Manual for Monitoring Food Marketing to Children' (Report, CI, September 2011) <<http://www.consumersinternational.org/media/795222/food-manual-english-web.pdf>>.
- 18 See WHO, 'Set of Recommendations on the Marketing of Foods and Non-Alcoholic Beverages to Children' (Recommendations, WHO, 21 May 2010) <http://apps.who.int/iris/bitstream/10665/44416/1/9789241500210_eng.pdf>; WHO, 'A Framework for Implementing the Set of Recommendations on the Marketing of Foods and Non-Alcoholic Beverages to Children' (Framework, WHO, January 2012) <http://apps.who.int/iris/bitstream/10665/80148/1/9789241503242_eng.pdf>.
- 19 C Hawkes and T Lobstein, 'Regulating the Commercial Promotion of Food to Children: A Survey of Actions Worldwide' (2011) 6 *International Journal of Pediatric Obesity* 83, 89–90.

responsible marketing to children in a number of countries,²⁰ accompanied by regional and international initiatives such as the *EU Pledge*.²¹ There is growing government interest in the operation of these initiatives, with some states monitoring self-regulation and/or threatening to regulate if food industry pledges prove ineffective.²² Some governments have gone further and introduced statutory or co-regulatory schemes restricting unhealthy food marketing to children, including the UK,²³ Ireland,²⁴ and South Korea.²⁵ Yet self-regulation remains the dominant national response to unhealthy food marketing to children,²⁶ despite increasing regulatory diversity in this area.

This paper examines self-regulation of food marketing to children, focusing on two voluntary pledges developed by the Australian food industry in 2008. The paper uses these codes as a case study of private regulation with public health objectives, and to explore the circumstances in which self-regulation can be effective. In the 20th century, public health law grew in scope to encompass chronic disease prevention, in addition to its traditional focus on issues such as infectious disease control and workplace health and safety.²⁷ With the exception of tobacco control, most governments show a preference for voluntary normative standards when addressing the behavioural risk factors for chronic disease (eg, unhealthy diets and excessive alcohol consumption),²⁸ probably due to the political power of the food and alcohol industries. Voluntary, industry-based programs are nevertheless expected to operate as effective regulatory mechanisms, and governments support these initiatives as a legitimate alternative to statutory regulation. As governments outsource a growing array of health governance functions to the private sector, analysis of self-regulation and other voluntary

20 Corinna Hawkes and Jennifer L Harris, 'An Analysis of the Content of Food Industry Pledges on Marketing to Children' (2011) 14 *Public Health Nutrition* 1403, 1404.

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

22 Hawkes and Lobstein, above n 19, 89–90.

23 See Committee of Advertising Practice ('CAP'), 'The BCAP Code: The UK Code of Broadcast Advertising' (Code, CAP, 1 September 2010) 60–3, 121–22.

24 See Broadcasting Authority of Ireland ('BAI'), 'BAI Children's Commercial Communications Code' (Code, BAI, August 2013) cls 11.4–11.7, 11.10, 13 <<http://www.bai.ie/en/codes-standards/>>; BAI, 'BAI General Commercial Communications Code' (Guide, BAI, August 2013) cl 8.4 <<http://www.bai.ie/en/codes-standards/>>.

25 See Ministry of Food and Drug Safety (Republic of Korea), *The Special Act on the Safety Management of Children's Dietary Life* <<http://www.mfds.go.kr/eng/index.do?nMenuCode=66>>; Soyoung Kim et al, 'Restriction of Television Food Advertising in South Korea: Impact on Advertising of Food Companies' (2013) 28 *Health Promotion International* 17.

26 Hawkes and Lobstein, above n 19.

27 Roger S Magnusson, 'Mapping the Scope and Opportunities for Public Health Law in Liberal Democracies' (2007) 35 *Journal of Law, Medicine & Ethics* 571, 572.

28 See, eg, Anna B Gilmore, Emily Savell and Jeff Collin, 'Public Health, Corporations and the New Responsibility Deal: Promoting Partnerships with Vectors of Disease?' (2011) 33 *Journal of Public Health* 2; Lisa L Sharma, Stephen P Teret and Kelly D Brownell, 'The Food Industry and Self-Regulation: Standards to Promote Success and to Avoid Public Health Failures' (2010) 100 *American Journal of Public Health* 240.

industry initiatives forms an increasingly important component of the scholarship on public health governance.²⁹

As in other jurisdictions, the introduction of the Australian pledges followed government encouragement, which can be traced back to a 2007 review of the *Children's Television Standards 2005* by the Australian Communications and Media Authority ('ACMA') (the Australian broadcasting regulator). In the final report of the review the ACMA asked the food industry to consider how it could address community concern about unhealthy food marketing to children without the need for further regulation.³⁰ The food industry responded by introducing two voluntary initiatives: the *Responsible Children's Marketing Initiative* ('RCMI')³¹ and the *Quick Service Restaurant Initiative for Responsible Advertising and Marketing to Children* ('QSRI').³² Similarly to pledges in other jurisdictions,³³ companies that join the codes agree to advertise only healthier products to children and to restrict their use of specific marketing techniques such as product placement. Participants translate the code's core principles into an action plan and report on compliance with this plan on an annual basis.³⁴ The Australian Food and Grocery Council ('AFGC') (an industry representative body) monitors and reviews both codes. Public complaints about non-compliance can be made to the Advertising Standards Board ('ASB'), which forms part of Australia's broader advertising self-regulatory system.³⁵

- 29 See, eg, Sharma, Teret and Brownell, above n 28; Vivica I Kraak et al, 'Balancing the Benefits and Risks of Public-Private Partnerships to Address the Global Double Burden of Malnutrition' (2012) 15 *Public Health Nutrition* 503; Anna Bryden et al, 'Voluntary Agreements between Government and Business — A Scoping Review of the Literature with Specific Reference to the Public Health Responsibility Deal' (2013) 110 *Health Policy* 186.
- 30 ACMA, 'Review of the *Children's Television Standards 2005*: Final Report of the Review' (Report, ACMA, August 2009) 7 <<http://www.acma.gov.au/Industry/Broadcast/Television/Childrens-TV/childrens-television-standards-review>>. See also ACMA, 'Review of the *Children's Television Standards 2005*: Report of the Review' (Report, ACMA, August 2008) 10 <http://www.acma.gov.au/webwri_assets/main/lib310132/cts_report_of_the_review.pdf>.
- 31 AFGC, 'Responsible Children's Marketing Initiative' (Code, AFGC, January 2014) ('RCMI'). Note that this reference refers to the updated (2014) version of the RCMI. The AFGC's website does not contain the original version of the code, but this can be found in appendices to various reports produced by the AFGC on the RCMI. For example, see AFGC, 'Responsible Children's Marketing Initiative: 2010 Compliance Report' (Report, AFGC, 2010) app 1 <<https://ifballiance.org/sites/default/files/rcmi%20compliance%20report%202010.pdf>>.
- 32 AFGC, 'Quick Service Restaurant Initiative for Responsible Advertising and Marketing to Children' (AFGC, January 2014) ('QSRI'). The disclaimer in the footnote above also applies to the QSRI. This reference refers to the revised (2014) version of the QSRI, but the original version can be found in: AFGC, 'Australian Quick Service Restaurant Industry Initiative for Responsible Advertising and Marketing to Children: 2011 Compliance Report' (Code, AFGC, 2011) app 1 <<https://ifballiance.org/documents/2015/07/qsri-compliance-report-2011.pdf>>.
- 33 See Hawkes and Harris, above n 20.
- 34 See RCMI, above n 31, 5; QSRI, above n 32, 5.
- 35 RCMI, above n 31, 5; QSRI, above n 32, 5; Advertising Standards Bureau, *Lodge a Complaint* <<https://adstandards.com.au/lodge-complaint>>.

The AFGC reports low levels of food advertising in television programs directed to children since the introduction of the *RCMI* and *QSRI*,³⁶ and high levels of compliance with the codes.³⁷ However, independent research finds that while food advertising has declined since the introduction of the *RCMI*, promotions for unhealthy products still comprise the majority of food advertising during children's peak television viewing times.³⁸ Further, fast food promotions appear to have increased despite the introduction of a dedicated pledge on fast food marketing.³⁹ Researchers explain the codes' lack of impact by pointing to much higher levels of non-compliance than reported by the AFGC,⁴⁰ loopholes in the codes' substantive terms and conditions,⁴¹ and inadequate processes of monitoring and enforcement.⁴² The National Preventative Health Taskforce also noted significant limitations in food industry self-regulation and recommended that the federal government introduce a phased approach for reducing children's exposure to unhealthy food marketing.⁴³ The government would first monitor and evaluate the *RCMI* and *QSRI* and address any shortfalls in the scheme with co-regulation. If co-regulation proved ineffective, the government would then use statutory regulation to phase out unhealthy food marketing on television before 9 pm, along with the use of premium offers, competitions, and promotional characters.⁴⁴

- 36 See AFGC, 'Food and Beverage Advertising to Children: Activity Report' (2012), above n 14, 9–10; AFGC, 'Food and Beverage Advertising to Children: Activity Report' (Report, AFGC, December 2010) 10–11 <[https://www.ifballiance.org/sites/default/files/2010%20advertising%20to%20kids%20activity%20report%20\(1\).pdf](https://www.ifballiance.org/sites/default/files/2010%20advertising%20to%20kids%20activity%20report%20(1).pdf)>.
- 37 See, eg, AFGC, 'Responsible Children's Marketing Initiative: 2010 Compliance Report', above n 31, 18; AFGC, 'Australian Quick Service Restaurant Industry Initiative for Responsible Advertising and Marketing to Children: 2011 Compliance Report', above n 32, 10.
- 38 Lesley King et al, 'Industry Self Regulation of Television Food Advertising: Responsible or Responsive?' (2011) 6 *International Journal of Pediatric Obesity* e390, e395.
- 39 Lana A Hebden et al, 'Advertising of Fast Food to Children on Australian Television: The Impact of Industry Self-Regulation' (2011) 195 *Medical Journal of Australia* 20, 21–2.
- 40 Michele Roberts et al, 'Compliance with Children's Television Food Advertising Regulations in Australia' (2012) 12 *BMC Public Health* 846.
- 41 Lana Hebden et al, 'Industry Self-Regulation of Food Marketing to Children: Reading the Fine Print' (2010) 21 *Health Promotion Journal of Australia* 229.
- 42 Lesley King et al, 'Building the Case for Independent Monitoring of Food Advertising on Australian Television' (2013) 16 *Public Health Nutrition* 2249; Belinda Reeve, 'Private Governance, Public Purpose? Assessing Transparency and Accountability in Self-Regulation of Food Advertising to Children' (2013) 10 *Bioethical Inquiry* 149, 157–9.
- 43 National Preventative Health Taskforce, 'Australia: The Healthiest Country by 2020 — National Preventative Health Strategy — The Roadmap for Action' (Strategy, National Preventative Health Taskforce, 30 June 2009) 123–5 <[http://www.health.gov.au/internet/preventativehealth/publishing.nsf/Content/CCD7323311E358BECA2575FD000859E1/\\$File/nphs-roadmap.pdf](http://www.health.gov.au/internet/preventativehealth/publishing.nsf/Content/CCD7323311E358BECA2575FD000859E1/$File/nphs-roadmap.pdf)>. The then federal Labor government established the National Preventative Health Taskforce in 2008 and charged it with developing strategies to address the main modifiable risk factors for chronic disease, namely tobacco smoking, excess alcohol consumption, and obesity. The Taskforce released its 'National Preventative Health Strategy' in 2009, accompanied by a series of technical papers. These documents are available from: Preventative Health Taskforce, *National Preventative Health Strategy* (4 September 2009) <<http://www.health.gov.au/internet/preventativehealth/publishing.nsf/Content/nphs-roadmap-toc>>.
- 44 National Preventative Health Taskforce, 'Australia: The Healthiest Country by 2020 — National Preventative Health Strategy — The Roadmap for Action', above n 43, 125.

Successive Australian federal governments have appeared reluctant to intervene in regulation of food marketing to children, despite evidence suggesting that the current scheme does not adequately protect children from exposure to unhealthy food marketing. The Rudd/Gillard Labor government's 2010 response to the National Preventative Health Taskforce committed to monitoring and evaluating the impact of the *RCMI* and *QSRI*, but not to statutory action.⁴⁵ These activities would be undertaken by the Australian National Preventive Health Agency ('ANPHA'), which the government established in response to the Taskforce's recommendations.⁴⁶ ANPHA released two draft frameworks to facilitate independent monitoring of food marketing to children in April 2013.⁴⁷ However the Abbott Coalition government, elected in September of that year, abolished the agency before it could undertake any more substantive work on food marketing regulation.⁴⁸ Thus, although there were some initial attempts at government oversight of food industry self-regulation, these have now fallen by the wayside. At the time of writing in 2016, political interest in the scheme is minimal,⁴⁹ despite

45 Australian Government, 'Taking Preventative Action — A Response to Australia: The Healthiest Country by 2020 — The Report of the National Preventative Health Taskforce' (Report No 6619, Australian Government, May 2010) 46–7 <https://www.clearinghouseofsport.gov.au/_data/assets/pdf_file/0010/738514/Taking_Preventative_Action,_a_response_to_Australia_-_the_healthiest_country_by_2020.pdf>.

46 Ibid 7–8. See also *Australian National Preventive Health Agency Act 2010* (Cth); Australian National Preventive Health Agency ('ANPHA'), 'Strategic Plan 2011–2015' (Plan, ANPHA, 2011) 17 <http://www.nationalplanningcycles.org/sites/default/files/country_docs/Australia/strategic_plan_2011-2015.pdf>.

47 ANPHA, 'Framework 1: Promoting a Healthy Australia' (Framework, ANPHA, 10 May 2013); ANPHA, 'Framework 2: Promoting a Healthy Australia' (Framework, ANPHA, 10 May 2013). ANPHA also commissioned a report from the Commonwealth Scientific and Industrial Research Organisation ('CSIRO') to review research on children's exposure to food and beverage marketing on television. CSIRO released a report in October 2012 that evaluated the impact of the *RCMI* and *QSRI*, and which showed that the amount of unhealthy food marketing in television programs with significant child audiences remained high, despite the introduction of the initiatives. See Lisa G Smithers, John W Lynch and Tracy Merlin, 'Television Marketing of Unhealthy Food and Beverages to Children in Australia: A Review of Published Evidence from 2009 — Final Report' (Report, ANPHA, October 2012).

48 See Australian Government, 'Budget 2014–15: Budget Measures' (Budget Paper No 2, Australian Government, 13 May 2014) 145; Senate Select Committee on Health, Parliament of Australia, *First Interim Report* (2014) 42. ANPHA's functions have been absorbed into the Commonwealth Department of Health, despite the Bill abolishing the agency failing to pass in the Senate. See Australian National Preventive Health Agency (Abolition) Bill 2014 (Cth).

49 The Australian Greens Party has attempted to introduce statutory restrictions on the marketing of unhealthy foods to children on television, beginning with the introduction of a private senator's Bill in September 2008 by the then Senator (and party leader) Bob Brown: see *Protecting Children from Junk Food Advertising (Broadcasting Amendment) Bill 2008* (Cth). The Senate referred the Bill to an inquiry by the Senate Standing Committee on Community Affairs, which recommended against new legislation until the food industry's scheme could be properly assessed. See Senate Standing Committee on Community Affairs, Parliament of Australia, *Protecting Children from Junk Food Advertising (Broadcasting Amendment) Bill 2008* (2008) 17–18. The Bill failed to pass, as it did in 2010 when Senator Brown reintroduced the Bill into Parliament. In November 2011, the then Senator introduced a second Bill that sought to ban unhealthy food advertising during children's television programming and peak viewing periods, but the Bill lapsed before its second reading in Parliament. See *Protecting Children from Junk Food Advertising (Broadcasting and Telecommunications Amendment) Bill 2011* (Cth).

continued pressure from public health advocates for governments to strengthen regulation of food marketing to children.⁵⁰

This paper undertakes an in-depth evaluation of the terms and conditions of the *RCMI* and *QSRI* and of the self-regulatory framework established by the initiatives, in the context of ongoing debate regarding the effectiveness of the codes and whether self-regulation or statutory regulation should be used to regulate food marketing to children. This form of analysis may provide an explanation as to why the codes have failed to reduce the amount of unhealthy food advertising viewed by Australian children and help to pinpoint areas in which the regulatory regime could be strengthened. An evaluation of self-regulation's effectiveness is timely because the codes underwent an independent review in 2012.⁵¹ The reviewer recommended a series of improvements to the scheme, and the AFGC subsequently released updated versions of the *RCMI* and *QSRI* in 2014. The code revisions provide an opportunity to assess whether the changes to the scheme are likely to reduce children's exposure to unhealthy food marketing, and whether the food industry is responsive to external critiques of self-regulation. A lack of responsiveness may indicate the need for government intervention as it demonstrates that the industry lacks the capacity, or willingness, to introduce a more demanding scheme on its own initiative.

The first section of the paper briefly outlines the regulatory framework for food advertising in Australia and describes the operation of the codes in more depth. The paper then builds a framework for evaluating the efficacy of voluntary industry initiatives based on a synthesis of literature from the fields of public health law and regulatory studies. This framework centres on the idea of responsive regulation, interpreted both as a dynamic regulatory strategy⁵² and as regulation that is responsive to social needs.⁵³ The next section of the paper applies this framework to the substantive terms and conditions of food industry self-regulation, and to the regulatory processes established by the codes. The analysis of the codes' key terms and definitions is informed by the Advertising Standards Board's determinations on complaints under the *RCMI* and *QSRI* from 2009 to 2015,⁵⁴ as well as a close analysis of the main code documents. The paper concludes by outlining a series of recommendations for progressively strengthening the initiatives through the use of novel regulatory measures.

50 See, eg, C Mills, J Martin and N Antonopoulos, 'End the Charade! The Ongoing Failure to Protect Children from Unhealthy Food Marketing' (Report, Obesity Policy Coalition, 2015) <<http://www.opc.org.au/downloads/submissions/end-the-charade.pdf>>.

51 Susannah Tymms, 'Responsible Advertising to Children: An Independent Review of the Australian Food and Beverage Industry Self-Regulatory Codes' (Review, October 2012).

52 See Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, 1992).

53 See Philippe Nonet and Philip Selznick, *Law and Society in Transition: Toward Responsive Law* (Transaction Publishers, 2nd ed, 2009).

54 The ASB's complaint determinations are available from: Advertising Standards Bureau, *Standards Board Cases* <<https://adstandards.com.au/cases>>.

II THE REGULATORY FRAMEWORK FOR FOOD ADVERTISING IN AUSTRALIA

The *RCMI* and *QSRI* operate within a complex, multi-layered regulatory environment for food advertising. Appendix 1 summarises the key sources of regulation for food advertising in Australia and their substantive provisions. Legislative restrictions on misleading and deceptive advertising can be found in the Australian Consumer Law (contained in the *Competition and Consumer Act 2010* (Cth)),⁵⁵ which is applied in each jurisdiction by state and territory Fair Trading Acts.⁵⁶ Food advertising is also subject to regulatory requirements found in the *Australia New Zealand Food Standards Code*.⁵⁷ The code is implemented by state-level Food Acts, which also contain provisions on misleading and deceptive food advertising.⁵⁸

A key avenue for restrictions on television food marketing is Australia's broadcasting regulatory scheme. The *Broadcasting Services Act 1992* (Cth) establishes a co-regulatory system for broadcast advertising in Australia, whereby industry groups take responsibility for the details of regulation in their own sector through the creation of industry codes of practice.⁵⁹ The Australian Communications and Media Authority maintains oversight of broadcasting regulation, including by approving industry codes of conduct, enforcing broadcasting licensing conditions, and intervening where self-regulation fails.⁶⁰ The ACMA also maintains standards for broadcasting licensees,⁶¹ including the *Children's Television Standards 2009* ('*CTS 2009*'). The *CTS 2009* obliges licensees to broadcast a certain amount of children's programming per year and regulate advertising broadcast in and around the times when that programming is broadcast.⁶²

One component of advertising regulation is the self-regulatory system run by the Australian Association of National Advertisers ('AANA'), the advertising industry's peak representative body. This scheme is based on a series of codes that apply to advertising in all media, including a general *Code of Ethics*⁶³ and

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

56 See, eg, *Fair Trading Act 1987* (NSW) s 28; *Australian Consumer Law and Fair Trading Act 2012* (Vic) s 8.

57 Food Standards Australia New Zealand, *Australia New Zealand Food Standards Code*, 1 March 2016.

58 See, eg, *Food Act 2003* (NSW) s 18; *Food Act 1984* (Vic) s 13.

59 See *Broadcasting Services Act 1992* (Cth) s 123; ACMA, 'Optimal Conditions for Effective Self- and Co-Regulatory Arrangements' (Occasional Paper, June 2010) 5 <<http://www.acma.gov.au/theACMA/optimal-conditions-for-effective-self-and-co-regulatory-arrangements>>.

60 *Broadcasting Services Act 1992* (Cth) s 125.

61 *Ibid* s 122.

62 ACMA, *Children's Television Standards 2009* (16 December 2014), ('*CTS 2009*').

63 AANA, 'Code of Ethics' (Code, January 2016) <http://aana.com.au/content/uploads/2016/08/Code_of_Ethics_081215.pdf>.

codes on marketing to children,⁶⁴ and on food marketing.⁶⁵ The AANA manages a complaints-handling mechanism that enables members of the public to make complaints to the Advertising Standards Board about breaches of the codes.⁶⁶ While funded by the advertising industry, the ASB operates independently of the AANA and comprises 20 people from a range of age groups and backgrounds.⁶⁷ The Advertising Claims Board provides a separate adjudication process for complaints lodged by competitors, and considers the truth, accuracy, or legality of advertising on a user-pays basis.⁶⁸ Both advertisers and members of the public may seek review of the ASB's determinations from an independent reviewer.⁶⁹ The Advertising Standards Bureau acts as the secretariat for the complaints-hearing bodies and accepts and processes complaints about advertising, as well as promoting the role of the ASB in the self-regulatory system.⁷⁰

Industry bodies in Australia have developed product-specific advertising codes of conduct,⁷¹ and the *RCMI* and *QSRI* fall into this category of regulation. The codes build upon existing food marketing regulation by restricting the type of food and beverage products that can be advertised to children to those that are 'healthier dietary choices'⁷² (as identified through the use of a nutrient profile model). Advertising is defined as directed to children based either on its placement in child-directed media or according to the creative content of the advertisement itself. Advertising to children must also include messaging that encourages good dietary habits and physical activity.⁷³ Participants agree to market only healthier products in product placement that appears in media directed to children,⁷⁴ and in interactive games that are directed to children.⁷⁵ Companies must not engage in any advertising or marketing to children in primary schools, preschools, or

64 AANA, 'Code for Advertising & Marketing Communications to Children' (Code, January 2016) <http://aana.com.au/content/uploads/2016/08/Advertising_Marketing_Comms_to_Children_Code_081215.pdf>.

65 AANA, 'Food & Beverages Advertising & Marketing Communications Code' (Code, August 2009) <http://aana.com.au/content/uploads/2016/08/Food_Beverages_Code_081215.pdf>.

66 Advertising Standards Bureau, *Advertising Standards Board* <<https://adstandards.com.au/about/standards-board>>.

67 Advertising Standards Bureau, Submission No 27 to House of Representatives Standing Committee on Social Policy and Legal Affairs, *Inquiry into the Regulation of Billboard and Outdoor Advertising*, 18 February 2010, 4 <http://www.aph.gov.au/parliamentary_Business/Committees/House_of_Representatives_Committees?url=spla/outdoor%20advertising/subs.htm>.

68 *Ibid* 5.

69 *Ibid* 31.

70 *Ibid* 3.

71 For example, the alcohol industry has created the *ABAC Responsible Alcohol Marketing Code*, which is accompanied by its own administration and complaints-handling mechanism. See ABAC Scheme, 'ABAC Responsible Alcohol Marketing Code' <<http://www.abac.org.au/wp-content/uploads/2014/06/ABAC-Responsible-Alcohol-Marketing-Code-30-4-14.pdf>>.

72 *RCMI*, above n 31, 6 [S1.1(a)]; *QSRI*, above n 32, 6 [S1.1(a)].

73 *RCMI*, above n 31, 6 [S1.1]; *QSRI*, above n 32, 6 [S1.1].

74 *RCMI*, above n 31, 6 [S1.2]; *QSRI*, above n 32, 6 [S1.2].

75 *RCMI*, above n 31, 6 [S1.3]; *QSRI*, above n 32, 6 [S1.3].

day care centres, unless expressly requested by school administration or under its supervision.⁷⁶

Participants write ‘Company Action Plans’ outlining the steps that they will take to put the relevant code into operation at a company level, and make an annual compliance report.⁷⁷ The AFGC manages the initiatives through an Initiative Administration Manager, overseen by an Initiative Administration Committee, who monitors compliance, prepares and publishes an annual report, and oversees review of the initiatives.⁷⁸ Public complaints about non-compliance can be made to the Advertising Standards Board,⁷⁹ which publishes reports of its determinations on the website of the Advertising Standards Bureau.⁸⁰ However, the ASB has no power to enforce its determinations directly, as discussed in Part V below.

III CREATING A FRAMEWORK FOR ASSESSING FOOD INDUSTRY PLEDGES ON ADVERTISING TO CHILDREN

Research into food industry pledges on advertising to children has focused largely on the *outcomes* of self-regulation, in terms of its impact on the volume of unhealthy food marketing during children’s peak television viewing times,⁸¹ improvements in the nutritional quality of products marketed to children,⁸² and in the use of persuasive techniques in food marketing to children.⁸³ This paper takes a different (but complementary) approach, focusing on whether the *RCMI* and *QSRI* establish the building blocks of an effective self-regulatory regime. This involves considering the terms and conditions of the codes themselves, as well as processes for administering, monitoring, enforcing, and reviewing the initiatives.

76 *RCMI*, above n 31, 6 [S1.4]; *QSRI*, above n 32, 6 [S1.4].

77 *RCMI*, above n 31, 5 [5.1]–[5.4]; *QSRI*, above n 32, 5 [5.1]–[5.4].

78 *RCMI*, above n 31, 4 [4.1]–[4.3]; *QSRI*, above n 32, 4 [4.1]–[4.3].

79 *RCMI*, above n 31, 5 [5.6]–[5.8]; *QSRI*, above n 32, 5 [5.6]–[5.8]. When considering a public complaint, an independent arbiter determines whether the product represents a healthy choice, while the ASB decides whether the advertisement is directed primarily to children according to the terms of the initiatives, and complies with the initiatives’ other principles. The independent arbiter is the Nutritional Physiology Research Centre at the University of South Australia. See AFGC, ‘Responsible Children’s Marketing Initiative: 2013 Compliance Report’ (Report, AFGC, 2013) 6.

80 See Advertising Standards Bureau, *Standards Board Cases*, above n 54.

81 See, eg, King et al, ‘Industry Self Regulation of Television Food Advertising: Responsible or Responsive?’, above n 38; Hebden et al, ‘Advertising of Fast Food to Children on Australian Television: The Impact of Industry Self-Regulation’, above n 39; King et al, ‘Building the Case for Independent Monitoring of Food Advertising on Australian Television’, above n 42; Michele Roberts et al, ‘Children’s Exposure to Food Advertising: An Analysis of the Effectiveness of Self-Regulatory Codes in Australia’ (2014) 71 *Nutrition & Dietetics* 35.

82 See, eg, Michele Roberts et al, ‘The Advertised Diet: An Examination of the Extent and Nature of Food Advertising on Australian Television’ (2013) 24 *Health Promotion Journal of Australia* 137.

83 See, eg, Hebden, King and Kelly, above n 11; S C Jones, P Gregory and L Kervin, ‘Branded Food References in Children’s Magazines: “Advertisements” Are the Tip of the Iceberg’ (2012) 7 *Pediatric Obesity* 220.

The paper draws upon a developing strand of public health research to create a framework for effective and accountable self-regulation, namely regulating (or engaging with) industries with negative public health impacts.⁸⁴ This research is informed by growing awareness of the contribution of the food, alcohol, and tobacco industries to the global burden of NCDs, both through the manufacture, sale, and marketing of unhealthy products,⁸⁵ and also through their efforts to subvert or stall the introduction of government prevention policies.⁸⁶ As mentioned above, the federal government encourages voluntary action by the food industry as a means of reducing diet-related health risks, as illustrated by the introduction of food industry self-regulation in Australia and also by collaborative public-private initiatives such as the ‘Health Star’ interpretive food labelling scheme.⁸⁷ This reflects a broader trend towards engaging and partnering with the food industry in public health governance which is also found in continental European countries, the UK, and the US.⁸⁸

Some public health advocates are deeply cynical about any form of industry engagement in NCD prevention, citing the marginal gains achieved by industry-based initiatives and the ‘dirty tactics’ used by the food, alcohol, and tobacco industries to shape policy to their interests.⁸⁹ Others take a more conciliatory (or perhaps pragmatic) stance and focus their research on how to design effective public health initiatives that involve cooperation with the business sector.⁹⁰ One theme in this literature is that the state should play a central role in securing

84 See, eg, Sharma, Teret and Kelly, above n 28; Kraak et al, ‘Balancing the Benefits and Risks of Public-Private Partnerships to Address the Global Double Burden of Malnutrition’, above n 29; Roger Magnusson and Belinda Reeve, ‘“Steering” Private Regulation? A New Strategy for Reducing Population Salt Intake in Australia’ (2014) 36 *Sydney Law Review* 255; Boyd Swinburn et al, ‘Strengthening of Accountability Systems to Create Healthy Food Environments and Reduce Global Obesity’ (2015) 385 *Lancet* 2534.

85 Boyd A Swinburn et al, ‘The Global Obesity Pandemic: Shaped by Global Drivers and Local Environments’ (2011) 378 *Lancet* 804; David Stuckler et al, ‘Manufacturing Epidemics: The Role of Global Producers in Increased Consumption of Unhealthy Commodities Including Processed Foods, Alcohol, and Tobacco’ (2012) 9 *PLoS Medicine* e1001235 <<http://dx.doi.org/10.1371/journal.pmed.1001235>>; Rob Moodie et al, ‘Profits and Pandemics: Prevention of Harmful Effects of Tobacco, Alcohol, and Ultra-Processed Food and Drink Industries’ (2013) 381 *Lancet* 670.

86 See, eg, Moodie et al, above n 85; William H Wiist, ‘The Corporate Play Book, Health, and Democracy: The Snack Food and Beverage Industry’s Tactics in Context’ in David Stuckler and Karen Siegel (eds), *Sick Societies: Responding to the Global Challenge of Chronic Disease* (Oxford University Press, 2011) 204; Lori Dorfman et al, ‘Soda and Tobacco Industry Corporate Social Responsibility Campaigns: How Do They Compare?’ (2012) 9 *PLoS Medicine* e1001241 <<http://dx.doi.org/10.1371/journal.pmed.1001241>>.

87 Australian Government, *Health Star Rating System* <<http://healthstarrating.gov.au/internet/healthstarrating/publishing.nsf/content/home>>.

88 See, eg, Gilmore, Savell and Collin, above n 28; Corinna Hawkes and Kent Buse, ‘Public Health Sector and Food Industry Interaction: It’s Time to Clarify the Term “Partnership” and Be Honest about Underlying Interests’ (2011) 21 *European Journal of Public Health* 400.

89 See, eg, Kelly D Brownell, ‘Thinking Forward: The Quicksand of Appeasing the Food Industry’ (2012) 9 *PLoS Medicine* e1001254 <<http://dx.doi.org/10.1371/journal.pmed.1001254>>; Kelly D Brownell and Kenneth E Warner, ‘The Perils of Ignoring History: Big Tobacco Played Dirty and Millions Died. How Similar Is Big Food?’ (2009) 87 *Milbank Quarterly* 259; David Stuckler and Marion Nestle, ‘Big Food, Food Systems, and Global Health’ (2012) 9 *PLoS Medicine* e1001242 <<http://dx.doi.org/10.1371/journal.pmed.1001242>>.

90 See, eg, Kraak et al, ‘Balancing the Benefits and Risks of Public-Private Partnerships to Address the Global Double Burden of Malnutrition’, above n 29.

population health, even when it outsources health governance functions to the business sector.⁹¹ In these circumstances, government monitoring, oversight, and intervention are important to ensuring that voluntary initiatives make a meaningful contribution to public health objectives, and to enhancing the accountability of private regulatory schemes to external affected parties.

Regulatory theory can be used to expand upon public health law's discussion of effective regulation of the corporate sector, and of the state's role in corporate governance strategies that aim to achieve public health goals. Regulatory theory characterises the contemporary era as one of 'regulatory capitalism', where growing capitalism and privatisation have heightened demands for transparent, public regulation of private activities, and for regulation of the state itself.⁹² This has resulted in a proliferation of new regulatory instruments and the diffusion of regulatory responsibilities between state, non-state, and civil society actors,⁹³ leading to increasingly complex and 'decentred' regulatory regimes.⁹⁴ A key theme is that the state remains deeply engaged in regulatory processes, even those that take place largely in the private sphere.⁹⁵ However, the state's role is predominantly one of 'meta-regulation' which it fulfils through activities such as monitoring industry codes or creating the legislative framework for co-regulation, rather than directly intervening in business activities.⁹⁶

Regulatory theory sets out prescriptions for effective regulatory design in conditions of regulatory capitalism, ie methods for increasing the transparency, fairness, and efficacy of regulatory systems. One prominent theory is that of responsive regulation. As developed by Ian Ayres and John Braithwaite, it consists of a dynamic regulatory strategy that begins with self-regulation, but escalates to more interventionist measures if industry fails to achieve public policy

91 See Magnusson and Reeve, above n 84, 270.

92 David Levi-Faur, 'The Global Diffusion of Regulatory Capitalism' (2005) 598 *Annals of the American Academy of Political and Social Science* 12; John Braithwaite, 'The Regulatory State?' in R A W Rhodes, Sarah A Binder and Bert A Rockman (eds), *The Oxford Handbook of Political Institutions* (Oxford University Press, 2006) 407; John Braithwaite, *Regulatory Capitalism: How It Works, Ideas for Making It Work Better* (Edward Elgar, 2008); David Levi-Faur, 'Regulatory Capitalism and the Reassertion of the Public Interest' (2009) 27 *Policy and Society* 181.

93 See, eg, Benjamin Cashore, Graeme Auld and Deanna Newsom, *Governing through Markets: Forest Certification and the Emergence of Non-State Authority* (Yale University Press, 2004); Luc W Franssen and Ans Kolk, 'Global Rule-Setting for Business: A Critical Analysis of Multi-Stakeholder Standards' (2007) 14 *Organization* 667.

94 Julia Black, 'Decentering Regulation: Understanding the Role of Regulation and Self-Regulation in a "Post-Regulatory" World' (2001) 54 *Current Legal Problems* 103.

95 Ian Bartle and Peter Vass, 'Self-Regulation within the Regulatory State: Towards a New Regulatory Paradigm?' (2007) 84 *Public Administration* 885, 889.

96 See, eg, Christine Parker, *The Open Corporation: Effective Self-Regulation and Democracy* (Cambridge University Press, 2002); Bronwen Morgan, 'Regulating the Regulators: Meta-Regulation as a Strategy for Reinventing Government in Australia' (1999) 1 *Public Management* 49; Christine Parker, 'Meta-Regulation: Legal Accountability for Corporate Social Responsibility' in Doreen McBarnet, Aurora Voiculescu and Tom Campbell (eds), *The New Corporate Accountability: Corporate Social Responsibility and the Law* (Cambridge University Press, 2007) 207; Sharon Gilad, 'It Runs in the Family: Meta-Regulation and Its Siblings' (2010) 4 *Regulation & Governance* 485.

objectives voluntarily.⁹⁷ The success of self-regulation hinges on a credible threat of government intervention in response to inaction, which provides industry with the incentive to create a genuinely demanding scheme, and to improve regulatory rules and processes in response to external criticism.⁹⁸ Regulatory scholars suggest that in addition to tailoring regulation to industry's willingness and capacity to comply, regulators should also design regulatory strategies according to the nature of the regulatory problem to be addressed and the policy objectives to be achieved, the different logics of regulatory tools, and the broader social and economic context of regulation.⁹⁹

This paper combines Philippe Nonet and Philip Selznick's theory of responsive law with the concept of responsiveness proposed by Ayres and Braithwaite. Nonet and Selznick hold that law should be responsive to public needs and values, and in doing so, must adapt to changing social pressures and demands.¹⁰⁰ This version of responsiveness draws together the values informing regulation and the technical aspects of regulatory design, as it implies that a central objective of regulation is to achieve a public purpose. Regulatory scholars argue that in order to determine the public interest that regulation should pursue, regulatory structures should enable participation and deliberation by all affected parties,¹⁰¹ for example through processes of public consultation.¹⁰² Decision-making involving participation and deliberation by all affected parties also ensures that the content and design of regulation remains responsive to public values and community concerns,¹⁰³ and (ideally) to the evidence base supporting regulatory intervention. Such procedures are more likely to produce regulation that reflects broad community consensus,¹⁰⁴ and is legitimate in the eyes of the public, and therefore more politically acceptable.¹⁰⁵

97 Ayres and Braithwaite, above n 52. See also Braithwaite, *Regulatory Capitalism*, above n 92, ch 4; John Braithwaite, *To Punish or Persuade: Enforcement of Coal Mine Safety* (State University of New York Press, 1985); John Braithwaite, *Restorative Justice and Responsive Regulation* (Oxford University Press, 2002); John Braithwaite, 'The Essence of Responsive Regulation' (2011) 44 *UBC Law Review* 475.

98 Ayres and Braithwaite, above n 52, 161.

99 See Neil Gunningham and Peter Grabosky, *Smart Regulation: Designing Environmental Policy* (Oxford University Press, 1998); Robert Baldwin and Julia Black, 'Really Responsive Regulation' (2008) 71 *Modern Law Review* 59.

100 Nonet and Selznick, above n 53, ch 4.

101 See Parker, *The Open Corporation*, above n 96, 38–9; Peter Vincent-Jones, 'Values and Purpose in Government: Central-Local Relations in Regulatory Perspective' (2002) 29 *Journal of Law & Society* 27; Julia Black, 'Proceduralizing Regulation: Part I' (2000) 20 *Oxford Journal of Legal Studies* 597; Julia Black, 'Proceduralizing Regulation: Part II' (2001) 21 *Oxford Journal of Legal Studies* 33; Julia Black, 'Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes' (2008) 2 *Regulation & Governance* 137.

102 See, eg, Bartle and Vass, above n 95, 898–9; Robert Baldwin, Martin Cave and Martin Lodge, *Understanding Regulation: Theory, Strategy, and Practice* (Oxford University Press, 2nd ed, 2012) 352; Neil Gunningham and Darren Sinclair, *Leaders and Laggards: Next-Generation Environmental Regulation* (Greenleaf, 2002) 145–7.

103 Black, 'Proceduralizing Regulation: Part I', above n 101.

104 Ibid.

105 Neil Gunningham and Darren Sinclair, 'Designing Environmental Policy' in Neil Gunningham and Peter Grabosky, *Smart Regulation: Designing Environmental Policy* (Oxford University Press, 1998) 373, 386. See also Magnus Boström, 'Regulatory Credibility and Authority through Inclusiveness: Standardization Organizations in Cases of Eco-Labeling' (2006) 13 *Organization* 345.

The two concepts of responsiveness proposed by Nonet and Selznick, and by Ayres and Braithwaite, point to broad principles that should inform the design of public health governance, including that:

- Law and regulation (including self-regulation) should be motivated by an explicit social objective related to improving health and wellbeing;
- Governments play a unique leadership role in public health regulation and remain responsible for securing public health, and the public interest in regulation;
- Governments must create the normative framework for public health regulation, which includes developing the broad goals and objectives that regulation should achieve, setting targets, and defining key regulatory terms and definitions;
- Voluntary and self-regulatory measures should operate within a framework of government monitoring and oversight; and
- Regulatory processes should incorporate a broad range of parties affected by regulation or with an interest in its outcome, for example, public health organisations, consumer groups, and other non-government actors.

Table 1 translates these principles into a detailed framework for the design of an effective, accountable, and responsive regulatory regime. This framework is divided into three main categories that reflect the regulatory stages of deciding upon rules and content, implementing regulatory processes, and enforcement.¹⁰⁶ The following section of the paper applies this framework to the *RCMI* and *QSRI*, beginning with their substantive terms and conditions.

106 Other factors determine the success of self-regulation, including whether a sufficient number of businesses within an industry join the relevant scheme, institutional influences such as the presence of a strong trade association, and whether there is a ‘community of shared fate’ within the regulated industry: see, eg, Neil Gunningham and Joseph Rees, ‘Industry Self-Regulation: An Institutional Perspective’ (1997) 19 *Law & Policy* 363; Joseph V Rees, *Hostages of Each Other: The Transformation of Nuclear Safety Since Three Mile Island* (University of Chicago Press, 1994). These factors are not covered in this paper due to space limitations.

107 Australian Competition and Consumer Commission (‘ACCC’), *Guidelines for Developing Effective Voluntary Industry Codes of Conduct* (Guidelines, ACCC, July 2011) 6 <<https://www.accc.gov.au/publications/guidelines-for-developing-effective-voluntary-industry-codes-of-conduct>>.

108 Ibid.

109 Sharma, Teret and Brownell, above n 28, 241.

110 ACCC, above n 107, 7; Department of Treasury and Finance, *Victorian Guide to Regulation* (Guide, Victorian Government, December 2014) 45 <<http://www.dtf.vic.gov.au/Publications/Victoria-Economy-publications/Victorian-guide-to-regulation>>; Vivica I Kraak et al, ‘An Accountability Framework to Promote Healthy Food Environments’ (2014) 17 *Public Health Nutrition* 2467.

111 WHO, ‘Set of Recommendations on the Marketing of Foods and Non-Alcoholic Beverages to Children’, above n 18, 11; King et al, ‘Building the Case for Independent Monitoring of Food Advertising on Australian Television’, above n 42; Government of Canada, *Voluntary Codes: A Guide for Their Development and Use* (Guide, March 1998) 24 <[http://www.ic.gc.ca/eic/site/oca-bc.nsf/vwapj/volcodes.pdf/\\$FILE/volcodes.pdf](http://www.ic.gc.ca/eic/site/oca-bc.nsf/vwapj/volcodes.pdf/$FILE/volcodes.pdf)>.

112 ACCC, above n 107, 13; Government of Canada, above n 111, 16.

Table 1: Criteria for effective self-regulation

Regulatory dimension	Component	Recommendation
Substantive content	Objectives	Clear, measurable objectives against which the success or failure of voluntary schemes can be assessed within a given timeframe. ¹⁰⁷
	Terms	Clear definitions of key terms. ¹⁰⁸
	Rules	Clear regulatory rules that are sufficiently expansive to achieve regulatory objectives.
Regulatory processes	Developing code objectives	Representation from multiple interests included in the development of self-regulation. ¹⁰⁹
	Administration	Fair and transparent administration by an accountable, independent body, with the roles and responsibilities of each member outlined in the main code document. ¹¹⁰
	Monitoring	A comprehensive, transparent, and independent monitoring system that includes baseline data on the nature and volume of food advertising prior to the code's introduction, as well as a set of measurable, time-bound process and outcome indicators. ¹¹¹
	Review	Regular, independent reviews of the scheme's operation, using baseline data and performance indicators. ¹¹²

107 Australian Competition and Consumer Commission ('ACCC'), *Guidelines for Developing Effective Voluntary Industry Codes of Conduct* (Guidelines, ACCC, July 2011) 6 <<https://www.accc.gov.au/publications/guidelines-for-developing-effective-voluntary-industry-codes-of-conduct>>.

108 Ibid.

109 Sharma, Teret and Brownell, above n 28, 241.

110 ACCC, above n 107, 7; Department of Treasury and Finance, *Victorian Guide to Regulation* (Guide, Victorian Government, December 2014) 45 <<http://www.dtf.vic.gov.au/Publications/Victoria-Economy-publications/Victorian-guide-to-regulation>>; Vivica I Kraak et al, 'An Accountability Framework to Promote Healthy Food Environments' (2014) 17 *Public Health Nutrition* 2467.

111 WHO, 'Set of Recommendations on the Marketing of Foods and Non-Alcoholic Beverages to Children', above n 18, 11; King et al, 'Building the Case for Independent Monitoring of Food Advertising on Australian Television', above n 42; Government of Canada, *Voluntary Codes: A Guide for Their Development and Use* (Guide, March 1998) 24 <[http://www.ic.gc.ca/eic/site/oca-bc.nsf/vwapj/volcodes.pdf/\\$FILE/volcodes.pdf](http://www.ic.gc.ca/eic/site/oca-bc.nsf/vwapj/volcodes.pdf/$FILE/volcodes.pdf)>.

112 ACCC, above n 107, 13; Government of Canada, above n 111, 16.

Regulatory dimension	Component	Recommendation
Enforcement	Complaints-handling	A fast, easily accessible complaints-handling mechanism; complaints determined by an independent body that possesses significant sanctions. ¹¹³
	Enforcement	A wide range of enforcement options, including both incentives and deterrents, as well as promotional and educational activities that raise the profile of self-regulatory schemes. ¹¹⁴

IV EVALUATING THE *RCMI* AND *QSRI*: REGULATORY PURPOSE AND SUBSTANTIVE TERMS AND CONDITIONS

A *The Codes' Objectives*

The goals of the *RCMI* and *QSRI* are to reduce advertising to children for less healthy foods and beverages, and to use advertising to help promote healthy dietary choices and lifestyles among Australian children.¹¹⁵ While the first objective could be measurable, it is not translated into concrete outcomes for participants to achieve, nor is it supported by indicators that measure the steps taken by participants to achieve the codes' objective. Further, the codes' main objective is framed in terms of reducing unhealthy food advertising that directly targets children, rather than reducing children's *overall exposure* to unhealthy food marketing. The World Health Organisation recommends that regulation should seek to reduce children's exposure to unhealthy food marketing because children see, and are influenced by, marketing that targets other audiences, making reductions in total exposure a more meaningful goal than simply eliminating marketing that specifically targets children.¹¹⁶

113 ACCC, above n 107, 9–11; Directorate-General for Health and Consumer Protection, 'Self-Regulation in the EU Advertising Sector: A Report of Some Discussion among Interested Parties' (Report, European Commission, July 2006) 20 <<https://ec.europa.eu/digital-single-market/en/content/dg-sanco-self-regulation-eu-advertising-sector-report-some-discussion-among-interested-0>>; European Advertising Standards Alliance, 'International Guide to Developing a Self-Regulatory Organisation' (Guide, ICAS, 2014) 47 <<http://www.easa-alliance.org/products-services/publications/guides-self-regulation>>; Debra Harker, 'Towards Effective Advertising Self-Regulation in Australia: The Seven Components' (2003) 9 *Journal of Marketing Communications* 93, 101–2.

114 Ayres and Braithwaite, above n 52; ACCC, above n 107, 11; Department of Treasury and Finance, above n 110, 28; Harker, above n 113, 104–5; Andrew A King and Michael J Lenox, 'Industry Self-Regulation without Sanctions: The Chemical Industry's Responsible Care Program' (2000) 43 *Academy of Management Journal* 698; Taskforce on Industry Self-Regulation, 'Industry Self-Regulation in Consumer Markets' (Report, Australian Government, August 2000) 61, 75–7 <<http://archive.treasury.gov.au/contentitem.asp?ContentID=1131>>.

115 *RCMI*, above n 31, 2; *QSRI*, above n 32, 2.

116 WHO, 'Set of Recommendations on the Marketing of Foods and Non-Alcoholic Beverages to Children', above n 18, 8; see also Cairns, Angus and Hastings, above n 10, 32.

B The Definition of ‘Children’

The *RCMI* defines ‘children’ as persons less than 12 years of age,¹¹⁷ while the *QSRI* applies to children who are under 14 years of age.¹¹⁸ Research based on theories of cognitive development finds that children’s understanding of the persuasive nature of advertising begins to develop at approximately eight years of age,¹¹⁹ and that most children can articulate a critical understanding of advertising by around 11 years of age.¹²⁰ However, developmental research in neuroscience, psychology, and marketing suggests that older children and adults are also susceptible to the persuasive effects of food marketing,¹²¹ bringing into question the low cut-off age used in food industry self-regulation. Further, because children are exposed to (and find appealing) marketing that targets adults and teenagers, a narrowly-defined age range may not fully protect younger children from the impact of food marketing.¹²² A more effective regulatory regime would apply to a wider range of ages, thus protecting older children from the persuasive effects of food advertising, and helping to address the problem of advertisers producing campaigns that target older children, but which younger children also find appealing.

C Media ‘Directed Primarily to Children’

Advertising must appear in media that are ‘directed primarily to children’ to fall within the ambit of the *RCMI* and *QSRI*. The definition of this term includes: all C- and P-rated television programs; G- and PG-rated programs that target children through their themes, visuals, or language; and media where children represent 35 per cent or more of the audience.¹²³ The vast majority of television

117 *RCMI*, above n 31, 3.

118 *QSRI*, above n 32, 3.

119 Sonia Livingstone and Ellen Helsper, ‘Advertising Foods to Children: Understanding Promotion in the Context of Children’s Daily Lives’ (Review, Department of Media and Communications, London School of Economics and Political Science, 7 May 2004) 2 <<http://stakeholders.ofcom.org.uk/binaries/research/tv-research/appendix2.pdf>>. See also Brian Wilcox et al, ‘Report of the APA Task Force on Advertising and Children’ (Report, American Psychological Association, 20 February 2004) 5 <<http://www.apa.org/pi/families/resources/advertising-children.pdf>>.

120 Deborah Roedder John, ‘Consumer Socialization of Children: A Retrospective Look at Twenty-Five Years of Research’ (1999) 26 *Journal of Consumer Research* 183, 190.

121 Julie Ralston Aoki and Elizabeth S Moore, ‘Self-Regulation as a Tool for Promoting Healthier Children’s Diets: Can CARU and the CFBAI Do More?’ in Jerome D Williams, Keryn E Pasch and Chiquita A Collins (eds), *Advances in Communication Research to Reduce Childhood Obesity* (Springer, 2013) 119, 134. See also Cornelia Pechmann et al, ‘Impulsive and Self-Conscious: Adolescents’ Vulnerability to Advertising and Promotion’ (2005) 24 *Journal of Public Policy & Marketing* 202; Jennifer L Harris, John A Bargh and Kelly D Brownell, ‘Priming Effects of Television Food Advertising on Eating Behavior’ (2009) 28 *Health Psychology* 404; Simone Pettigrew et al, ‘The Effects of Television and Internet Food Advertising on Parents and Children’ (2013) 16 *Public Health Nutrition* 2205.

122 WHO, ‘A Framework for Implementing the Set of Recommendations on the Marketing of Foods and Non-Alcoholic Beverages to Children’, above n 18, 12.

123 *RCMI*, above n 31, 3; *QSRI*, above n 32, 3.

food advertising takes place in general audience programming,¹²⁴ with very low levels of food advertising in C and P programs. Because there are so few food advertisements during dedicated children's programs, the application of the codes most often hinges on whether an advertisement is broadcast in a program with an audience share of 35 per cent or more children. This is particularly the case given that the ASB very rarely finds that a program is directed to children based on the program's creative content (see below).

The original version of the *RCMI* applied to media with an audience comprising more than 50 per cent children.¹²⁵ However, there are few or no general audience programs where children comprise half or more of the viewing audience. This is due in part to the fact that children make up a relatively small proportion of the total potential viewing population, ie 19 per cent.¹²⁶ Accordingly, the code excluded programs such as *The Simpsons*,¹²⁷ which are watched by large numbers of children and adults alike, meaning that children do not comprise a majority of the audience.

The food industry revised down the audience share criterion from 50 per cent to 35 per cent in the 2014 versions of the *RCMI* and *QSRI*,¹²⁸ in line with recommendations from the independent review of the codes.¹²⁹ However, the reduced audience threshold seems unlikely to capture many more programs that are popular with children. One study of the US *Children's Food and Beverage Advertising Initiative* (which also uses a 35 per cent audience share requirement) found that approximately half of all food and beverage advertisements viewed by

124 Smithers, Lynch and Merlin, above n 47, 36; Kathy Chapman, Penny Nicholas and Rajah Supramaniam, 'How Much Food Advertising Is There on Australian Television?' (2006) 21 *Health Promotion International* 172; Bridget Kelly et al, 'Trends in Food Advertising to Children on Free-to-Air Television in Australia' (2011) 35 *Australian and New Zealand Journal of Public Health* 131.

125 See AFGC, 'Responsible Children's Marketing Initiative: 2010 Compliance Report', above n 31, 19.

126 ACMA, 'Attachment B: Children's Television Viewing — Analysis of Audience Data 2001–13' (Report, ACMA, March 2015) 9, 37–45 <<http://www.acma.gov.au/theACMA/Library/researchacma/Research-reports/childrens-television-viewing-research>>. See also Lesley King et al, 'Consultancy Report on Inappropriate Food Marketing to the National Preventative Taskforce' (Report, Institute of Obesity, Nutrition and Exercise, University of Sydney, January 2009) 12.

127 S MacKay et al, 'A Comprehensive Approach to Protecting Children from Unhealthy Food Advertising and Promotion' (Proposal, Obesity Policy Coalition, 2011) 24 <<http://www.opc.org.au/downloads/positionpapers/protecting-children-unhealthy-food-advertising-promotion.pdf>>.

128 The original version of the *QSRI* did not define media 'directed primarily to children' with reference to the audience share of media or the media's rating. On this basis, the Advertising Standards Board held that it was only relevant to consider the content of an advertisement when determining whether the advertisement was directed to children (see, eg, ASB, *Case Report: McDonald's Aust Ltd Case Number 084/11* (13 April 2011) <<https://adstandards.com.au/cases/2011/April?ref=0084/11>>). As a result, the *QSRI* had a narrower application than the *RCMI*, as it did not prohibit advertisements for unhealthy products that appealed to a general audience but which were screened or published in media with large child audiences. Following a review of the *QSRI* in 2011, the AFGC revised the initiative so that it defined 'media directed primarily to children' in a similar manner to the *RCMI*. See Healthy Kids Association, 'Final Report on the Compliance of Signatories to the Australian Quick Service Restaurant Industry Initiative for Responsible Advertising to Children' (Report, AFGC, 2011); AFGC, 'Response: In Response to: Healthy Kids Association Incorporated — Final Report on the Compliance of Signatories to the Australian Quick Service Restaurant Industry Initiative for Responsible Advertising to Children' (Response, AFGC, 9 January 2012) 5.

129 Tymms, above n 51, 58.

children were not subject to the code because they appeared in programs with an audience share of less than 35 per cent children.¹³⁰

If a television program (or other medium) does not meet the audience share requirement, it may still fall within the ambit of the *RCMI* and *QSRI* if the creative content used in the program (or other medium) is directed primarily to children. However, the Advertising Standards Board rarely finds that a program meets this criterion when it determines complaints about breaches of the *RCMI* and *QSRI*, more often finding that the program's content is targeted to a general or adult audience.¹³¹ The result of the code's narrow definition of media 'directed primarily to children' is that the *RCMI* and *QSRI* do not apply to general audience programs that are watched by large child audiences, but are not designed specifically for children (and do not have an audience share of 35 per cent or more children). For example, the reality television show *My Kitchen Rules* is one of the most-watched programs by children under the age of 12, but is excluded from the code's ambit.¹³² Substantial reductions in the amount of unhealthy food advertising viewed by children would require regulation based on much more comprehensive placement restrictions, including in media that attract large absolute numbers of children.¹³³ One option suggested by public health advocates is time-based restrictions, such as bans on television food advertising before 9 pm.¹³⁴

D Advertising Content 'Directed Primarily to Children'

An advertisement will fall within the ambit of the codes if the overall impact of the visuals, language, and themes used in the advertisement means that it is directed

130 Jennifer L Harris et al, 'Defining "Child-Directed Advertising" to Reduce Unhealthy Television Food Advertising' (2013) 44 *American Journal of Preventive Medicine* 358, 361.

131 Examples of programs that have strong appeal to children, but which fall outside of the audience share requirement (both the 35 per cent and the 50 per cent thresholds) include *Junior MasterChef* and *The Simpsons*. See, eg, ASB, *Case Report: Mars Confectionery* Case Number 0439/10 (24 November 2010) <<https://adstandards.com.au/cases/2010/November?ref=0439/10>>. See also ASB, *Case Report: Coca-Cola South Pacific* Case Number 0204/15 (10 June 2015) <<https://adstandards.com.au/Cases/2015/June?ref=0204/15>>. Examples of programs that the ASB has held were directed to children include the movies *Bee Movie* and *Ice Age 2*. See ASB, *Case Report: Kraft Food Ltd* Case Number 0136/11 (11 May 2011) <<https://adstandards.com.au/Cases/2011/May?ref=0136/11>>.

132 See ASB, *Case Report: Coca-Cola South Pacific* Case Number 0204/15 (10 June 2015); David Dale, 'What Our Kids Watch on TV', *The Sydney Morning Herald* (online), 16 March 2014 <<http://www.smh.com.au/entertainment/tv-and-radio/what-our-kids-watch-on-tv-20140315-34tah.html>>.

133 See MacKay et al, above n 127, 31.

134 Ibid; C Hawkes, 'Self-Regulation of Food Advertising: What It Can, Could and Cannot Do to Discourage Unhealthy Eating Habits among Children' (2005) 30 *Nutrition Bulletin* 374, 381; Elizabeth Handsley et al, 'Regulatory Axes on Food Advertising to Children on Television' (2009) 6(1) *Australia and New Zealand Health Policy* 1, 7; Sarah MacKay, 'Food Advertising and Obesity in Australia: To What Extent Can Self-Regulation Protect the Interests of Children?' (2009) 35 *Monash University Law Review* 118, 134.

primarily to children, regardless of whether it appears in child-directed media.¹³⁵ However, the Advertising Standards Board interprets the phrase ‘directed primarily to children’ very narrowly in its complaint determinations.¹³⁶ One complaint involved an advertisement for Allen’s Snakes confectionery (owned by Nestlé) which showed children and adults in a street setting and a giant doll blowing bubbles over the crowd.¹³⁷ Some of the bubbles changed into lollies, and the advertisement showed a scene of a child eating one, while a nursery rhyme played in the background. Despite the presence of children in the advertisement, and its animated components, the ASB held that the advertiser’s intent was to ‘create a nostalgic scene which would remind adults of their childhoods’.¹³⁸ Thus, while the advertisement ‘would be of considerable attraction to children’, its overall impact meant that it was not ‘specifically directed or designed to be clearly directly primarily appealing to children’.¹³⁹

As pressure grows on food companies to restrict their marketing to children, advertisers increasingly target parents in promotions for children’s food products.¹⁴⁰ This may also be interpreted as an attempt by companies to circumvent increasingly stringent restrictions on food marketing to children.¹⁴¹ Although advertisers often use different promotional techniques depending on whether they are targeting adults or children,¹⁴² marketing to adults for children’s products sometimes blurs the boundaries between target audiences and can incorporate techniques that also appeal to children, such as themes of fun or fantasy.¹⁴³ However, the ASB requires that an advertisement be directed *exclusively* to children if it is to fall within the scope of the *RCMI* or *QSRI*.

In some instances, the ASB has been willing to find that an advertisement is primarily directed to children despite the advertiser intending to target an older audience,¹⁴⁴ but in the majority of complaint determinations the ASB finds that

135 See ASB, *Case Report: Nestle Australia Ltd* Case Number 0429/10 (27 October 2010) 5 <<https://adstandards.com.au/Cases/2010/October/?ref=0429/10>>; ACMA, ‘Industry Self-Regulation of Food and Beverage Advertising to Children: ACMA Monitoring Report’ (Report, ACMA, December 2011) 15 <<http://www.acma.gov.au/~media/Diversity%20Localism%20and%20Accessibility/Report/pdf/Industry%20selfregulation%20of%20food%20and%20beverage%20advertising%20to%20childrenACMA%20monitoring%20report.PDF>>.

136 ACMA, ‘Industry Self-Regulation of Food and Beverage Advertising to Children: ACMA Monitoring Report’, above n 135, 19.

137 ASB, *Case Report: Nestle Australia Ltd* Case Number 0429/10 (27 October 2010).

138 *Ibid* 6.

139 *Ibid*.

140 See Jennifer A Emond et al, ‘Children’s Food and Beverage Promotion on Television to Parents’ (2015) 136 *Pediatrics* 1095; Jeremy Lee, ‘Food Advertising Shifts Focus from Kids to Parents’, *Campaign* (London), 8 July 2008 <<http://www.campaignlive.co.uk/article/829678/food-advertising-shifts-focus-kids-parents>>; Anna Glayzer and Jessica Mitchell, ‘How Parents Are Being Misled: A Campaign Report on Children’s Food Marketing’ (Report, British Heart Foundation, 2008) <http://image.guardian.co.uk/sys-files/Guardian/documents/2008/12/15/G449_How_parents_are_being_misled_report.pdf>.

141 Glayzer and Mitchell, above n 140, 29. The author is grateful to one of the paper’s anonymous reviewers for making this suggestion.

142 Emond et al, above n 140, 1098; Glayzer and Mitchell, above n 140.

143 Hebden, King and Kelly, above n 11, 777.

144 See, eg, ASB, *Case Report: Coca-Cola South Pacific* Case Number 0204/15 (10 June 2015).

the advertisement in question is not specifically directed to children — despite many of these advertisements containing at least some elements that would appeal to children. This interpretive approach excludes a large number of unhealthy food promotions from the ambit of the *RCMI* and *QSRI*, and allows advertisers to sidestep the codes by designing advertising that appeals to adults or families as well as to children.¹⁴⁵ Further, it does not address the problem of children being exposed to advertising content designed for adults or teenagers, but which they also find appealing. An effective regime would require much more broad-ranging restrictions on the use of advertising content that children find appealing and persuasive, such as the use of animated characters and themes of fun and fantasy.¹⁴⁶

E Marketing Techniques Covered by the Scheme

A related point is that the codes exclude a number of persuasive techniques that children find particularly appealing (and which are widely used in food marketing), including popular personalities, third-party licensed characters, and premium offers, ie offering a free gift or toy with the purchase of a food product.¹⁴⁷ The codes also permit the use of proprietary characters developed and owned by food advertisers, such as Ronald McDonald or Cadbury's Freddo Frog.¹⁴⁸ This is a critical loophole in the initiatives, particularly in light of the longstanding and pervasive use of proprietary characters in food marketing, and their significant role in establishing brand loyalty with children,¹⁴⁹ the effects of which may persist into adulthood.¹⁵⁰

The initiatives originally limited the use of licensed characters and personalities to marketing for healthier choice items, and required that references to premiums be 'merely' incidental to the product being advertised.¹⁵¹ However, the AFGC removed these provisions from the more recent versions of the *RCMI* and *QSRI*.

145 Hebden, King and Kelly, above n 11, 780.

146 See, eg, Gregory M Rose, Altaf Merchant and Aysen Bakir, 'Fantasy in Food Advertising Targeted at Children' (2012) 41(3) *Journal of Advertising* 75; G Jenkin et al, 'A Systematic Review of Persuasive Marketing Techniques to Promote Food to Children on Television' (2014) 15 *Obesity Reviews* 281.

147 See, eg, Hebden, King and Kelly, above n 11.

148 Jane Landon and Yvonne Gritschneider, 'An Analysis of the Regulatory and Voluntary Landscape Concerning the Marketing and Promotion of Food and Drink to Children' (Report, National Heart Forum, 2011) 43–4 <http://nhfshare.heartforum.org.uk/RMAssets/NHF_Staffpublications/VoluntaryPrinciples/NHFFoodMarkMAINFinal.pdf>. See also Hawkes and Harris, above n 20, 1408.

149 David Lawrence, 'The Role of Characters in Kids Marketing' (2003) 4(3) *Young Consumers* 43; Emma J Boyland and Jason C G Halford, 'Television Advertising and Branding. Effects on Eating Behaviour and Food Preferences in Children' (2012) 62 *Appetite* 236; Jessica Castonguay et al, 'Healthy Characters? An Investigation of Marketing Practices in Children's Food Advertising' (2013) 45 *Journal of Nutrition Education and Behavior* 571.

150 Paul M Connell, Merrie Brucks and Jesper H Nielsen, 'How Childhood Advertising Exposure Can Create Biased Product Evaluations That Persist into Adulthood' (2014) 41 *Journal of Consumer Research* 119.

151 See AFGC, 'Responsible Children's Marketing Initiative: 2010 Compliance Report', above n 31, 19–21; AFGC, 'Australian Quick Service Restaurant Industry Initiative for Responsible Advertising and Marketing to Children: 2011 Compliance Report', above n 32, 12–15.

This was because restrictions on premium offers and popular personalities/program characters can be found in the *CTS 2009* and the AANA's codes,¹⁵² and pledge participants expressed concerns about the overlap between similar provisions in the various advertising regulatory instruments and the difficulties that they experienced in navigating the precise requirements of each form of regulation.¹⁵³ However, removing the provisions on licensed characters and premium offers still narrows the scope of the *RCMI* and *QSRI*, particularly considering that food industry pledges in other jurisdictions typically include provisions limiting the use of licensed characters and program characters in unhealthy food marketing to children.¹⁵⁴

F Media Channels Covered by the Scheme

The scope of the *RCMI* and *QSRI* is based on the term 'medium'. Both codes were expanded following the 2012 review to include all internet sites (the codes previously excluded company-owned websites), as well as traditional media such as television, radio, print, and cinema.¹⁵⁵ However, the codes still exclude advertising via apps on cell phones and tablets, as well as word-of-mouth marketing, product packaging and labelling, and point-of-sale material.¹⁵⁶ The exclusion of apps is particularly troubling given that digital media play a

- 152 See *CTS 2009*, above n 62, CTS 33, 35; AANA, 'Code for Advertising & Marketing Communications to Children', above n 64, cls 2.10–2.11; AANA, 'Food & Beverages Advertising & Marketing Communications Code', above n 65, cl 3.6. The ASB and the ACMA have taken different views on whether the toys contained in children's meals are premium offers. The ASB has held that the toys contained in McDonald's Happy Meals and in Hungry Jack's Kid's Club Meals are not premium offers for the purposes of the AANA codes or the *QSRI* and nor are the toys contained in Kinder Surprises for the purposes of the *RCMI*: see ASB, *Case Report: Hungry Jacks Complaint Reference Number 573/09* (9 December 2009) <<https://adstandards.com.au/cases/2009/December?ref=573/09>>; ASB, *Case Report: McDonald's Complaint Reference Number 572/09* (9 December 2009) <<https://adstandards.com.au/cases/2009/December?ref=572/09>>. In contrast, the ACMA has determined that the toys in McDonald's Happy Meals constitute a premium offer for the purposes of the *CTS 2009*: see ACMA, *Investigation Report 2364, 2372, 2389, 2390, 2391* (9 December 2010) <http://beta.acma.gov.au/~media/Broadcasting%20Investigations/Investigation%20reports/TV%20investigations/Word%20Document/ch7-network10_reports-2364_2372_2389_2390_2391-mcdonalds%20pdf.pdf>.
- 153 Interview with a representative of the AFGC (Telephone Interview, 21 May 2015); Email from a representative of the AFGC to the author, 15 December 2015. See also Appendix 1 of this paper.
- 154 See, eg, Council of Better Business Bureaus ('BBB'), 'Children's Food and Beverage Advertising Initiative: Program and Core Principles Statement' (Statement, 4th ed, BBB, January 2014) 3 <<https://www.bbb.org/globalassets/local-bbbs/council-113/media/cfbai/enhanced-core-principles-fourth-edition-with-appendix-a.pdf>>; Advertising Standards Council ('ASC'), 'Canadian Children's Food & Beverage Advertising Initiative' (Initiative, ASC, January 2016) 2–3 <http://www.adstandards.com/en/childrensinitiative/CCFBAI_EN.pdf>. The Initiatives' provision on licensed characters was also broader in scope than similar provisions found in the AANA's code on advertising to children or in the *CTS 2009*. This is because the relevant provisions in the *RCMI* and *QSRI* prohibited the use of licensed characters or popular personalities in advertising directed to children for unhealthy products across all media (covered by the codes), while the *CTS 2009* only restricts the use of characters in promotions during designated children's television viewing times.
- 155 *RCMI*, above n 31, 3; *QSRI*, above n 32, 3.
- 156 See J Lumley, J Martin and N Antonopoulos, 'Exposing the Charade: The Failure to Protect Children from Unhealthy Food Advertising' (Report, Obesity Policy Coalition, 2012) 12–14 <<http://www.opc.org.au/downloads/positionpapers/exposing-the-charade.pdf>>.

significant role in young people's lives,¹⁵⁷ and with food companies shifting their advertising spend from television to digital platforms.¹⁵⁸ In several determinations, the ASB has held that apps fall within the scope of the codes.¹⁵⁹ For example, in a complaint about the Fanta 'Fruit Slam 2' app (which enabled children to play games such as catching fruit), the ASB held that the app was a form of interactive game, meaning that it fell within the scope of the *RCMI*.¹⁶⁰ While the ASB may consider complaints about apps in some circumstances at least, a much more transparent and consistent approach would be to include apps specifically in the codes' definition of 'medium', as well as including other excluded communication channels, such as product packaging and labelling, and in-store displays.

Overall, the initiatives take a narrow view of advertising, excluding a range of other elements in the marketing mix, such as sponsorship, branding, and product line advertising, where companies promote 'healthier choice' items from a line of products that includes less healthy alternatives.¹⁶¹ In 2013, the fast food industry extended the *QSRI* so that signatories could give away food and beverage products at children's sports events only if these products were 'healthy dietary choices'.¹⁶² However, this restriction is very narrow, excluding sports events at which both children and adults participate as well as cultural or music events, and fails to address concerns about the widespread sponsorship of Australian professional and community sporting organisations by food companies promoting unhealthy

157 See Obesity Policy Coalition, 'Policy Brief: Advertising Unhealthy Products to Children through Advergaming, Online Activities, Apps and Social Media: The Need for Policy Reform.' (Policy Brief, Obesity Policy Coalition, March 2014) 2 <<http://www.opc.org.au/downloads/positionpapers/policy-brief-advertising-new-media-online.pdf>>; Newspoll, prepared for ACMA, 'Like, Post, Share: Young Australians' Experience of Social Media' (Report, Newspoll, 2013) 6–12 <<http://www.acma.gov.au/theACMA/young-australians-and-social-media>>.

158 Jon Leibowitz et al, 'A Review of Food Marketing to Children and Adolescents: Follow-Up Report' (Report, Federal Trade Commission, December 2012) 6 <<https://www.ftc.gov/reports/review-food-marketing-children-adolescents-follow-report>>.

159 See, eg, ASB, *Case Report: McDonald's Aust Ltd* Case Number 0336/15 (9 September 2015) <<https://adstandards.com.au/cases/2015/September?ref=0336/15>>; ASB, *Case Report: McDonald's Aust Ltd* Case Number 166/14 (28 May 2014) <<https://adstandards.com.au/cases/2014/May?ref=0166/14>>.

160 ASB, *Case Report: Coca-Cola South Pacific* Case Number 0206/15 (10 June 2015) <<https://adstandards.com.au/cases/2015/June?ref=0206/15>>. See also ASB, *Case Report: McDonald's Aust Ltd* Case Number 0558/14 (28 January 2015) (decided under the *QSRI*) <<https://adstandards.com.au/cases/2015/January?ref=0558/14>>. In an earlier determination, the Board held that apps did not fall within the scope of the term 'medium' and so could not be considered under the *RCMI*. This determination concerned the earlier version of the code, but these inconsistencies in the ASB's determinations make it difficult to determine whether an app is considered to fall within the scope of the codes. See ASB, *Case Report: Kellogg (Aust) Pty Ltd* Case Number 0237/13 (24 July 2013) <<https://adstandards.com.au/cases/2013/July?ref=0237/13>>.

161 Ralston Aoki and Moore, above n 121, 140. For example, in one complaint concerning Lion's promotion of two 'Yogo' products on a dedicated product 'micro-site', the complainant argued that while the two promoted products represented 'healthier choice' items, there were other products within the range that did not. Further, despite only marketing two specific products, the effect of the website as a whole was to promote the Yogo brand and the entire product range. The ASB rejected this argument, holding that as the less healthy products did not appear on the website it was beyond the scope of the *RCMI* and the Board's charter to consider the issue: ASB, *Case Report: Lion* Case Number 0075/14 (9 April 2014) <<https://adstandards.com.au/cases/2014/April?ref=0075/14>>.

162 See AFGC, 'Response: In Response To: Healthy Kids Association Incorporated — Final Report on the Compliance of Signatories to the Australian Quick Service Restaurant Industry Initiative for Responsible Advertising to Children', above n 128, 5; *QSRI*, above n 32, 6 [S1.5].

products.¹⁶³ Research demonstrates that this sponsorship influences children's brand recall and beliefs, and their preferences for sponsoring companies' products.¹⁶⁴ Brand marketing is also critical to reaching child consumers,¹⁶⁵ and brand advertising can influence taste perceptions, with one study finding that children preferred the taste of products branded with McDonald's logos compared to identical unbranded products.¹⁶⁶ Thus, while the *RCMI* and *QSRI* cover a range of media and some common marketing techniques, they leave companies with a wide array of persuasive strategies and promotional channels through which to market unhealthy products to children.

G Nutrition Criteria

Under the *RCMI* and *QSRI*, participants must only advertise 'healthier dietary choice' products to children, which are identified using nutrient profile models that categorise foods based on their nutritional content.¹⁶⁷ *RCMI* participants may use either an existing government or health organisation criteria or their own company-developed model to identify healthier choice products.¹⁶⁸ This adds a layer of complexity to the scheme, and company-developed criteria are also much more lenient than those created by government or scientific organisations, identifying products such as Coco Pops cereal (comprising 36.5 per cent sugar, by weight) as suitable for marketing to children.¹⁶⁹ The *QSRI* contains one nutrient profiling scheme that all signatories use to identify healthy choice products that can be advertised to children,¹⁷⁰ and which sets out required meal composition, maximum energy levels, and limits on salt, sugar, and fat content.¹⁷¹ However, the *QSRI* applies only to children's meals, meaning that the code does not apply to most fast food advertising.¹⁷² The independent review recommended that the AFGC adopt a uniform nutrient model for use with the *RCMI*,¹⁷³ similar to the

163 Jill Sherriff, Denise Griffiths and Mike Daube, 'Cricket: Notching up Runs for Food and Alcohol Companies?' (2009) 34 *Australian and New Zealand Journal of Public Health* 19; Bridget Kelly et al, 'Food and Drink Sponsorship of Children's Sport in Australia: Who Pays?' (2010) 26 *Health Promotion International* 188.

164 Simone Pettigrew et al, 'Game On: Do Children Absorb Sports Sponsorship Messages?' (2013) 16 *Public Health Nutrition* 2197, 2201–2.

165 Roedder John, above n 120; Ralston Aoki and Moore, above n 121, 140.

166 Thomas N Robinson et al, 'Effects of Fast Food Branding on Young Children's Taste Preferences' (2007) 161 *Archives of Pediatrics and Adolescent Medicine* 792. See also Samuel M McClure et al, 'Neural Correlates of Behavioral Preference for Culturally Familiar Drinks' (2004) 44 *Neuron* 379.

167 See Mike Rayner, Peter Scarborough and Asha Kaur, 'Nutrient Profiling and the Regulation of Marketing to Children. Possibilities and Pitfalls' (2013) 62 *Appetite* 232.

168 *RCMI*, above n 31, 5 [5.3].

169 Lana Hebden et al, 'Regulating the Types of Foods and Beverages Marketed to Australian Children: How Useful Are Food Industry Commitments?' (2010) 67 *Nutrition & Dietetics* 258, 265.

170 *QSRI*, above n 32, 7.

171 *Ibid.*

172 Hebden et al, 'Advertising of Fast Food to Children on Australian Television: The Impact of Industry Self-Regulation', above n 39, 23; ACMA, 'Industry Self-Regulation of Food and Beverage Advertising to Children: ACMA Monitoring Report', above n 135, 12.

173 Tymms, above n 51, 59.

QSRI and to food industry pledges in other jurisdictions.¹⁷⁴ The AFGC has not yet done so, citing the difficulties in selecting one model from the array of criteria developed by government and non-government organisations.¹⁷⁵

V EVALUATING THE *RCMI* AND *QSRI*: REGULATORY PROCESSES AND ENFORCEMENT

A *Establishing the RCMI and QSRI*

The section above outlined the many loopholes in the substantive terms and conditions of the *RCMI* and *QSRI*. These are accompanied by limitations in the regulatory processes established by the two codes, beginning with the processes used by the food industry to establish the initiatives. The AFGC formed a working group with its member companies to develop the *RCMI*'s core principles and definitions,¹⁷⁶ while the creation of the *QSRI* resulted from collaboration between Australia's four main quick service restaurants in consultation with the AANA.¹⁷⁷ However, the food industry did not consult with government, consumers, public health advocates, or other affected stakeholders when developing either code, undermining the fairness and legitimacy of rule-setting processes, as well as the scheme's responsiveness to external stakeholder concerns.¹⁷⁸ It is unlikely that community views and concerns will be embedded in the substantive content of the codes without some form of external stakeholder engagement in code development processes.¹⁷⁹

B *Administration and Monitoring of the RCMI and QSRI*

The AFGC secretariat originally monitored and enforced the codes through dedicated staff located in its secretariat.¹⁸⁰ The independent reviewer recommended the establishment of a code oversight committee,¹⁸¹ and the AFGC responded to this recommendation by establishing a formal Initiative Administration Committee comprising a Chair (an AFGC board member or delegate), two industry representatives, and two external stakeholders (currently

174 This includes the US *Children's Food and Beverage Advertising Initiative* and the Canadian *Children's Food Advertising Initiative*. See BBB, above n 154, 1; ASC, above n 154, 2.

175 Interview with a representative of the AFGC (Telephone Interview, 21 May 2015).

176 Interview with a representative of the AFGC (Canberra, 8 July 2011).

177 See AFGC, 'Australian Quick Service Restaurant Industry Initiative for Responsible Advertising and Marketing to Children: 2011 Compliance Report', above n 32, 12–15.

178 David Cohen, 'The Role of the State in a Privatized Regulatory Environment' in Kernaghan Webb (ed), *Voluntary Codes: Private Governance, the Public Interest and Innovation* (Carleton University, 2004) 35, 40–1.

179 Ibid.

180 Tymms, above n 51, 60.

181 Ibid.

a nutritionist and a marketing academic).¹⁸² The presence of two external stakeholders on the Initiative Administration Committee opens up administrative processes to some degree of external input and oversight. However, industry representatives comprise the majority of the Committee's membership, meaning that external stakeholders are likely to be overruled in any attempt to act against industry interests. Further, the two external stakeholders act in an advisory role,¹⁸³ rather than representing community or public health interests. The presence of two external stakeholders on the Initiative Administration Committee appears tokenistic in the absence of equal representation of industry and external interests, and suggests that public health concerns will not be a significant influence in the future development and administration of the scheme.

The monitoring mechanism for the codes has three main components: company self-reporting, monitoring of television advertising by the AFGC, and an analysis of participants' compliance and the number of public complaints made each year.¹⁸⁴ Although monitoring lends the scheme a degree of transparency, the monitoring mechanism is entirely industry based (ie there is no formal monitoring by an independent, external body), and it is 'narrow and selective' in its reporting criteria.¹⁸⁵ Participants report annually on compliance with their company action plans, but the scheme does not mandate reporting against clear process or outcome indicators, creating significant variation in the quality of companies' reports. Signatories also adapt the codes' requirements to their own practices and product lines, and by reporting on compliance with their own interpretation of the codes' principles, participants can be described as 'grading their own exam papers'.¹⁸⁶ Self-reporting also relies upon signatories providing complete information on their advertising practices and compliance processes.¹⁸⁷ Yet companies are unlikely to reveal instances of serious non-compliance that would risk negative publicity and endanger their reputation, and as discussed below, independent research suggests that at least some companies are under-reporting non-compliance with the codes.¹⁸⁸

The AFGC purchases advertising data to review signatories' marketing activities against the terms of the codes and makes the results publicly available in an 'Activity Report'.¹⁸⁹ The 2012 report found that children were 'exposed to very low levels of non-core food and beverage advertising on television',¹⁹⁰ but this

182 *RCMI*, above n 31, 4 [4.3], 7; *QSRI*, above n 32, 4 [4.3], 8.

183 Interview with a representative of the AFGC (Telephone Interview, 21 May 2015).

184 See *RCMI*, above n 31, 5 [5.1]–[5.6]; *QSRI*, above n 32, 5 [5.1]–[5.5].

185 King et al, 'Consultancy Report on Inappropriate Food Marketing to the National Preventative Taskforce', above n 126, 28.

186 Gunningham and Sinclair, *Leaders and Laggards: Next-Generation Environmental Regulation*, above n 102, 143.

187 King et al, 'Industry Self Regulation of Television Food Advertising: Responsible or Responsive?', above n 38, e396.

188 See Roberts et al, 'Compliance with Children's Television Food Advertising Regulations in Australia', above n 40.

189 See AFGC, 'Food and Beverage Advertising to Children: Activity Report' (2010), above n 36; AFGC, 'Food and Beverage Advertising to Children: Activity Report' (2012), above n 14.

190 AFGC, 'Food and Beverage Advertising to Children: Activity Report' (2012), above n 14, 10.

finding should be interpreted in light of significant limitations in the AFGC's methodology. For example, the AFGC evaluated children's exposure to food marketing during children's programs (as defined by the initiatives), but not during children's peak viewing times (which occur during the screening of general audience programming) when children are exposed to large amounts of food advertising.¹⁹¹ Studies evaluating the impact of food industry self-regulation use different methodologies. However, the AFGC's research fails to account for the full extent of children's exposure to unhealthy food marketing, particularly when compared to independent research that evaluates children's exposure to food marketing during a much wider range of time periods.¹⁹²

In addition to the Activity Report, the AFGC produces an annual 'Compliance Report' that summarises companies' annual reports, its own monitoring activities, and any public complaints under the initiatives.¹⁹³ These reports state that compliance with the initiatives is high (at 99.7 per cent for the *RCMI* and 99.5 per cent for the *QSRI* in 2014);¹⁹⁴ that any instances of non-compliance are unintentional; and that companies have taken steps to remedy any gaps in their compliance practices voluntarily.¹⁹⁵ Reports of high overall compliance hide inconsistent levels of compliance by individual signatories, with Hungry Jack's breaching the *QSRI* 245 times during a three-month period in 2014, for example, compared to 29 breaches by McDonald's during the same period.¹⁹⁶ Further, independent research suggests much higher levels of non-compliance than reported by the AFGC or code participants. One study found that Simplot (an *RCMI* participant) had screened an advertisement for fish fingers 139 times in designated children's television viewing times, despite reporting only 'occasional' screenings of the advertisement during this time period.¹⁹⁷ These findings bring into question the credibility of self-reporting and underscore the importance of independent monitoring of industry self-regulation.¹⁹⁸

191 Smithers, Lynch and Merlin, above n 47, 11; ACMA, 'Attachment B: Children's Television Viewing — Analysis of Audience Data 2001–13', above n 126, 29.

192 See, eg, King et al, 'Industry Self Regulation of Television Food Advertising: Responsible or Responsive?', above n 38.

193 See, eg, AFGC, 'Responsible Children's Marketing Initiative: 2010 Compliance Report', above n 31; AFGC, 'Australian Quick Service Restaurant Industry Initiative for Responsible Advertising and Marketing to Children 2011 Compliance Report', above n 32.

194 AFGC, 'Annual Compliance Report: 2014 Annual Compliance Report for the *RCMI* and *QSRI*' (Report, AFGC, 2014) 6, 13.

195 Ibid 3, 10–16.

196 Ibid 13–15. See also Esther Han, 'Hungry Jack's Triples Its Number of Children's Food Advertising Code Breaches', *The Sydney Morning Herald* (online), 1 September 2015 <<http://www.smh.com.au/business/retail/hungry-jacks-triples-its-number-of-childrens-food-advertising-code-breaches-20150831-gjbrmo.html>>.

197 Roberts et al, 'Compliance with Children's Television Food Advertising Regulations in Australia', above n 40, 3.

198 King et al, 'Industry Self Regulation of Television Food Advertising: Responsible or Responsive?' above n 38; King et al, 'Building the Case for Independent Monitoring of Food Advertising on Australian Television', above n 42.

C Public Complaints under the RCMI and QSRI

The terms of the codes allow public complaints to be made to the ASB about alleged breaches of the *RCMI* and *QSRI*.¹⁹⁹ The public reporting of the ASB's determinations opens up self-regulation to external scrutiny, and an independent complaints-handling mechanism is a strong element of the scheme,²⁰⁰ particularly given its absence in food industry pledges in other jurisdictions.²⁰¹ However, the complexity of advertising self-regulation undermines the role of the complaints mechanism in enhancing the transparency and accountability of the scheme.²⁰² The *RCMI* and *QSRI* operate within an advertising regulatory system that is technical and confusing,²⁰³ making it difficult for members of the public to identify instances of non-compliance, and to determine whether a complaint is warranted.²⁰⁴ Further, the ASB may refuse to consider a complaint where it concerns an advertisement that is no longer running, the Board has already considered a complaint about the same advertisement, or the complaint concerns a company that is not a signatory to the codes.²⁰⁵ The complaint handling process may deter the public from complaining about breaches of the codes, particularly given the time, money, and expertise required to do so.²⁰⁶ Accordingly, the number of complaints the ASB receives may not truly reflect the level of consumer concern about food advertising to children, nor does it provide an accurate measure of participants' compliance.

D Enforcing Food Industry Self-Regulation

The *RCMI* and *QSRI* do not provide for any sanctions to be applied to companies that breach the codes, relying instead upon the ASB as the main enforcement mechanism. The ASB may order the withdrawal or modification of an advertisement if it decides that an advertisement breaches the codes. The advertising industry argues that these sanctions have significant reputational and financial repercussions for companies that breach advertising self-regulation, providing a strong motivation for compliance.²⁰⁷ However, delays in the complaints-hearing process mean that a campaign may have finished before the ASB makes an adverse finding, and the determination will have a negligible

199 *RCMI*, above n 31, 5 [5.7]–[5.9]; *QSRI*, above n 32, 5 [5.6]–[5.8].

200 Tymms, above n 51, 61.

201 *Ibid.* For example, neither the *EU Pledge* nor the *US Children's Food and Beverage Advertising Initiative* provides for an independent complaints-handling mechanism.

202 King et al, 'Consultancy Report on Inappropriate Food Marketing to the National Preventative Taskforce', above n 126, 28.

203 Lumley, Martin and Antonopoulos, above n 156, 15.

204 *Ibid.*; Mills, Martin and Antonopoulos, above n 50, 9.

205 ASB, *Frequently Asked Questions* <<http://www.adstandards.com.au/process/frequently-askedquestions/>>; Mills, Martin and Antonopoulos, above n 50, 10.

206 Mills, Martin and Antonopoulos, above n 50, 9; Elizabeth Handsley et al, 'Media, Public Health and Law: A Lawyer's Primer on the Food Advertising Debate' (2007) 12 *Media and Arts Law Review* 87, 96.

207 See, eg, European Advertising Standards Alliance, above n 113, 17.

deterrent impact in these circumstances.²⁰⁸ The ASB has no means of enforcing its orders directly if companies choose not to comply,²⁰⁹ but it may refer a complaint to an appropriate government agency, comment on the advertiser's lack of response in its determination, or forward its decision to media proprietors.²¹⁰ The Advertising Standards Bureau claims that there is almost total compliance with the ASB's determinations,²¹¹ making any further enforcement action largely unnecessary. However, the ASB upholds only a very low number of complaints to begin with, leading researchers to question whether the ASB's determinations truly serve community rather than industry interests.²¹²

Although the independent review recommended that the AFGC increase incentives for compliance,²¹³ the AFGC rejected the need for a more extensive array of punitive sanctions, such as fines. The AFGC's position is that non-compliance is dealt with effectively by the AFGC discussing breaches with participants and by signatories exerting peer pressure on other companies to ensure that all participants adhere to the scheme. The AFGC may also rescind a company's membership from the industry association in response to egregious and persistent non-compliance with the codes.²¹⁴ However, the lack of any explicit, meaningful sanctions in the codes undermines the credibility of softer enforcement methods, such as persuasion and peer pressure,²¹⁵ and leaves the scheme open to free riding, whereby companies join the scheme without taking any action to improve their advertising practices.²¹⁶ Empirical studies of regulation suggest that voluntary schemes that operate without effective enforcement mechanisms are likely to require some kind of government or third party intervention if they are to be more than minimally effective.²¹⁷

208 Mills, Martin and Antonopoulos, above n 50, 10.

209 Lumley, Martin and Antonopoulos, above n 156, 18; ACMA, 'Industry Self-Regulation of Food and Beverage Advertising to Children: ACMA Monitoring Report', above n 135, 30.

210 Advertising Standards Bureau, Submission No 27 to House of Representatives Standing Committee on Social Policy and Legal Affairs, above n 67, 10.

211 Ibid. Rates of compliance with the ASB's determinations were 95.9 per cent in 2014. However, this was because one advertiser was responsible for 19 of the 21 cases where the ASB upheld the complaint, but refused to comply with any of the ASB's rulings. According to the Advertising Standards Bureau, if this advertiser was omitted then compliance rates would be 99.6 per cent, consistent with previous years. See Advertising Standards Bureau, 'Review of Operations 2014' (Review, ASB, 2015) 18 <<http://joom.ag/4Oap>>.

212 Robert Crawford and Ruth Spence-Stone, 'Upholding Whose Values? Australia's Advertising Standards Bodies, 1974–2009' (2012) 4 *Journal of Historical Research in Marketing* 273, 281.

213 Tymms, above n 51, 12.

214 Interview with a representative of the AFGC (Telephone Interview, 21 May 2015).

215 Ayres and Braithwaite, above n 52; Neil Gunningham, 'Environment, Self-Regulation, and the Chemical Industry: Assessing Responsible Care' (1995) 17 *Law & Policy* 57, 82.

216 See, eg, King and Lenox, above n 114.

217 Gunningham and Rees, above n 106, 396. See also King and Lenox, above n 114.

E Review of the RCMI and QSRI

As described above, the AFGC commissioned an independent review of the *RCMI* and *QSRI* in 2012,²¹⁸ and responded to the resulting report with revisions to the codes. Independent review is critical to the dynamic process of learning from regulatory failures and improving upon the scheme in response.²¹⁹ However, an effective and accountable regime requires that private regulators respond in a meaningful way to external criticism of the scheme.²²⁰ As this paper has outlined, the AFGC acted on some of the independent reviewer's recommendations but avoided those that would have involved a significant compromise, such as the adoption of sanctions, and even narrowed some of the substantive terms and conditions of the codes. The AFGC faces a difficult challenge in balancing the interests of its member companies and those of external parties (such as health advocates). However, the legitimacy and credibility of self-regulation will be undermined if the scheme furthers industry interests at the expense of meaningful restrictions on food advertising. Further, while the independent review was a positive first step, the terms of the initiatives do not commit the AFGC to periodic, independent review of the *RCMI* and *QSRI*, a measure that would significantly enhance the transparency and accountability of self-regulation.

VI STRENGTHENING FOOD INDUSTRY SELF-REGULATION: A PHASED APPROACH

This paper has described numerous loopholes in the substantive terms and conditions of the *RCMI* and *QSRI*, which provide one explanation as to why the codes have failed to significantly reduce children's exposure to unhealthy food advertising.²²¹ Table 2 outlines some of the gaps that would need to be covered in the substantive terms and conditions of food industry self-regulation, if it is to provide more wide-reaching restrictions on unhealthy food marketing to children.²²² Further, the voluntary scheme established by the *RCMI* and *QSRI* does not meet criteria for the effective design and implementation of self-regulation, as the codes lack process and outcome performance indicators, independent administration, systematic and objective monitoring, meaningful sanctions for

218 See AFGC, 'Responsible Children's Marketing Initiative: 2011 Compliance Report' (Report, AFGC, 2011) 22.

219 Parker, *The Open Corporation*, above n 96; Braithwaite, *Restorative Justice and Responsive Regulation*, above n 97. The author is grateful to one of the paper's anonymous reviewers for making this point.

220 Kraak et al, 'An Accountability Framework to Promote Healthy Food Environments,' above n 110, 2479.

221 See King et al, 'Industry Self-Regulation of Television Food Advertising: Responsible or Responsive?', above n 38; Hebden et al, 'Advertising of Fast Food to Children on Australian Television: The Impact of Industry Self-Regulation', above n 39; King et al, 'Building the Case for Independent Monitoring of Food Advertising on Australian Television', above n 42.

222 For similar recommendations, see WHO, 'Set of Recommendations on the Marketing of Foods and Non-Alcoholic Beverages to Children', above n 18; MacKay et al, above n 127; Lumley, Martin and Antonopoulos, above n 156.

noncompliance, and a program of ongoing review. Table 3 provides a summary of recommendations for improvements that would enhance the efficacy and accountability of regulatory processes.

Table 2: Proposed improvements to the terms and conditions of the RCMI and QSRI

Element of the codes	Proposed definition
Definition of ‘children’	Include children under the age of 16 at a minimum.
Media ‘directed to children’	Marketing communications intended exclusively for children (eg C and P television programs); those with a marked appeal to children (according to the creative content of the media) and media viewed by a large number of children, eg television programs during children’s peak viewing times. Alternatively, unhealthy food advertising could be prohibited before 9 pm on television.
Advertising ‘directed to children’	Advertisements that are intended or likely to appeal to children, regardless of whether they also appeal to other age groups. Specific factors to be considered include the creative content of the advertisement (eg the use of humour) and the type of product advertised.
Promotional channels	The definition of ‘media’ should apply to all communication channels, including product labelling and packaging and point-of-sale material. Advertising and promotion should also be restricted at events and in settings where large numbers of children gather, including child care centres, schools, and playgrounds.
Promotional techniques	The codes should apply to a broad range of persuasive techniques, including the use of licensed and company-owned characters, celebrities, and premium offers and other giveaways.
Definition of ‘advertising and marketing’	The codes should draw on broad definitions of advertising and marketing that include brand and product line advertising and sponsorship arrangements.
Food and beverage products	The codes should be based on uniform nutrition criteria that place demanding standards on participating companies and that are determined by an independent organisation and/or a government agency, through processes of consultation.

Table 3: Recommendations for improving the self-regulatory framework established by the RCMI and QSRI

Scheme Aspect	Recommendation
Objectives	Objectives based on reducing children’s exposure to unhealthy food advertising and measurable targets related to this objective, accompanied by process and outcome indicators.
Administration	Administration by an independent body including government, consumer, and public health representation. The codes should specify the body’s functions and responsibilities, including monitoring, oversight, and enforcement.
Monitoring	Regular and systematic monitoring by an independent third party across all media, including the collection of baseline data on food advertising prior to the codes’ introduction, and the collection and evaluation of data related to objectives set out in the codes, and on participants’ compliance.
Complaints handling	Complaints could be heard by the independent administrative body, or a separate panel comprising equal representation from parties external to industry.
Enforcement	A range of sanctions are made available for non-compliance, combined with incentives/rewards for good behaviour. Copy advice or pre-clearance may prevent children from viewing unhealthy food advertising.
Review	Ongoing, independent review of the scheme using processes that incorporate external stakeholders.

One of the most significant problems highlighted by this paper is that the food industry retains almost total control over the regulatory scheme established by the *RCMI* and *QSRI*. The government presents industry self-regulation as an alternative to statutory regulation of food advertising to children, yet the public does not have a meaningful voice in how this private regulatory system is run, or the outcomes it achieves.²²³ Also, the industry appears to be unwilling to make the kind of comprehensive revisions that would be required to address the concerns of public health actors and other stakeholders to a significant extent. In short, it has failed to demonstrate that it is sufficiently responsive to external stakeholders’ concerns to warrant the continuation of self-regulation without external intervention. As importantly, it has failed to achieve the substantive goal of reducing children’s exposure to unhealthy food marketing. In these circumstances, there is a strong case for government intervention in the self-regulatory scheme, based on the principles of responsive regulation.

This paper proposes a phased approach to strengthening regulation of food advertising to children, rather than the immediate introduction of new statutory

223 See Virginia Haufler, *A Public Role for the Private Sector: Industry Self-Regulation in a Global Economy* (Carnegie Endowment for International Peace, 2001) 2.

controls. Legislative restrictions on food marketing face several significant barriers. The food industry has already claimed control of the regulatory space by creating its own system of governance, making it more difficult for government to introduce an alternative regulatory scheme.²²⁴ The industry makes a significant contribution to the Australian economy,²²⁵ giving it considerable influence over policy development. Arguably, this is one of the main reasons why food advertising to children remains governed by ineffective, industry-based schemes. The Australian government is engaged in a number of collaborative initiatives with the industry,²²⁶ and it is unlikely to introduce legislative measures that would jeopardise this collaborative relationship. Government action is also constrained by growing demand for evidence-based policy making, and by a regulatory agenda that favours deregulation and reducing red tape, often at the expense of public health concerns.²²⁷ These barriers to government regulation mean that command-and-control options may not be practical or politically feasible, at least not immediately.

The phased approach proposed in this paper draws upon ‘regulatory scaffolds’ to introduce progressively more demanding requirements to the existing system of regulation. This approach enables government to ensure that regulatory processes do not further private interests at the expense of public health goals, while navigating the barriers to direct statutory regulation of food advertising to children.²²⁸ It is a form of ‘middle way’ that enables government to pressure industry to improve its performance voluntarily, but also allows for the escalation of government intervention where these improvements are not forthcoming. The three-phase strategy proposed here involves strengthening self-regulation along three key dimensions: the substantive terms and conditions of the codes, the regulatory processes established by the codes, and enforcement of the scheme.

A Phase One

Phase one would involve significant expansion of the substantive terms and conditions of the codes in order to close off the loopholes in the codes outlined above. Strengthening the scheme in this manner would require strong government

224 See Belinda Reeve and Roger Magnusson, “‘Legislative Scaffolding’: A New Approach to Prevention” (2013) 37 *Australian and New Zealand Journal of Public Health* 494.

225 AFGC, ‘State of the Industry 2015: Essential Information: Facts and Figures’ (Report, AFGC, 2015) 3, 53–9 <<http://www.afgc.org.au/wp-content/uploads/AFGC-State-of-the-Industry-Report-2015.pdf>>.

226 See, eg, the ‘Health Star’ interpretive food labelling scheme developed by the Commonwealth Department of Health in conjunction with the food industry and public health organisations: Australian Government, *Health Star Rating System*, above n 87.

227 Bebe Loff and Brad R Crammond, ‘Wanted: Politicians to Champion Health (Not Obesity)’ (2010) 192 *Medical Journal of Australia* 397; Don Nutbeam, ‘How Does Evidence Influence Public Health Policy? Tackling Health Inequalities in England’ (2003) 14 *Health Promotion Journal of Australia* 154; Ross C Brownson, Jonathan E Fielding and Christopher M Maylahn, ‘Evidence-Based Public Health: A Fundamental Concept for Public Health Practice’ (2009) 30 *Annual Review of Public Health* 175.

228 See also Magnusson and Reeve, above n 84.

leadership, including setting a clear objective for the scheme to achieve within a given timeframe (namely, reducing children's exposure to marketing for unhealthy food products) supported by a set of process and outcome indicators for participants to achieve. Phase one would also include the development by Food Standards Australia New Zealand of uniform nutrition criteria that all code participants would use to identify products that are suitable for marketing to children.

Phase one would create the conditions for effective self-regulatory processes. The code administration committee would be expanded to include equal representation from key government agencies and other external and internal stakeholders, with all members holding equal voting rights. The committee would oversee a more comprehensive monitoring mechanism, including the collection of data on children's exposure to unhealthy food marketing and the nutritional quality of products marketed to children, as well as participants' levels of compliance. It would be granted a wide range of incentives to encourage good performance, and sanctions to deter non-compliance. Code participants would be subject to mandatory reporting against process and outcome indicators, allowing the administration committee to track improvements from year to year and to make comparisons between signatories. An independent panel would hear alleged breaches of the initiatives, with the panel comprising equal representation from a range of external interests, including consumer and parent representative groups. Other options might be for public complaints to be made to a consumer ombudsman,²²⁹ or to a panel comprising a subset of the code administration committee members.

B Phase Two

Phase two would be triggered if a review of the scheme indicated that it had failed to achieve high levels of compliance, and to meet interim targets related to reducing children's exposure to unhealthy food marketing. In phase two, the government would create legislative infrastructure that required government approval of food advertising codes and identified the particular objectives to be achieved by the codes. Membership of the *RCMI* and *QSRI* would become mandatory under this co-regulatory system, with penalties applying to companies that failed to produce a company action plan and to report annually on compliance. Adding 'legislative scaffolds' to self-regulation would not necessarily preclude industry from participating in processes of code development and administration. However, it would impose real pressure on industry to take regulation seriously, as it would become easier for government to prescribe a code, or part of the content of a code, and to build in new regulatory requirements if an improved co-regulatory regime

229 See, eg, *Radio- och TV-lag* (Sweden) No 2010:696 (Sweden) ch 16 s 2 [Myndigheten för press, radio och tv trans, *Radio and Television Act* (2010)] <<http://www.radioochtv.se/documents/styrdokument/radio%20and%20television%20act.pdf>>, cited in WHO, 'A Framework for Implementing the Set of Recommendations on the Marketing of Foods and Non-Alcoholic Beverages to Children', above n 18, 36.

proved ineffective.²³⁰ For example, phase two could involve the progressive expansion of the substantive controls contained in the *RCMI* and *QSRI*, such as the adoption of a lower audience threshold for the definition of ‘media directed primarily to children’, or raising the age of children covered by the codes’ rules.

The government could strengthen regulatory processes in phase two by transferring monitoring and enforcement of the codes to a government agency, such as the federal Department of Health. This agency would be granted a statutory mandate giving it the power to acquire information on compliance, as well as the power to sanction underperforming companies through the use of measures such as warning notices and fines. Companies that continually breached the codes could also be subject to enforceable undertakings that would require them to create a plan that outlined the steps they would take to improve their compliance, subject to approval by the administrative agency.²³¹ The agency could also bring enforcement action if companies failed to meet the terms and conditions of their undertakings. A key component of phase two would be to signal to the food industry that an even more intrusive scheme would follow if a stronger co-regulatory system failed to significantly reduce children’s exposure to unhealthy food marketing.

C Phase Three

Phase three controls would come into play if a subsequent review demonstrated that industry had failed to make significant progress under the co-regulatory scheme proposed in phase two. Phase three would involve statutory measures that phased out unhealthy food marketing on television before 9 pm; restricted unhealthy food marketing in other media with large child audiences; and banned marketing in and around sites where large numbers of children gather.²³² It would also limit the use of marketing techniques that children find persuasive (in unhealthy food advertising appearing in all media), including premium offers, equity brand characters, and characters and celebrities that are popular with children. A government agency would take charge of monitoring and enforcing phase three restrictions, including prosecuting companies that engaged in serious

230 The *Broadcasting Services Act 1992* (Cth) provides a template for this kind of co-regulatory approach, as it requires the ACMA to register codes of conduct developed by the broadcasting industry: at s 122.

231 Enforceable undertakings are an enforcement measure common to a range of regulatory regimes in Australia, including workplace health and safety, and consumer protection. They constitute ‘promises’ offered by companies (who have allegedly breached their statutory obligations) to undertake certain actions towards compliance, which are agreed to by the regulator. In exchange, the regulator agrees not to pursue other methods of enforcement, such as prosecution. The undertaking may be enforced in court, sometimes with additional sanctions for breaching the undertaking. See Richard Johnstone and Christine Parker, ‘Enforceable Undertakings in Action — Report of a Roundtable Discussion with Australian Regulators’ (Working Paper No 71, National Research Centre for OHS Regulation, February 2010) <http://regnet.anu.edu.au/sites/default/files/publications/attachments/2015-05/WorkingPaper_71_0.pdf>.

232 This proposal follows the recommendations of the National Preventative Health Taskforce. See National Preventative Health Taskforce, ‘Australia: The Healthiest Country by 2020 — National Preventative Health Strategy — The Roadmap for Action’, above n 43, 123–5. For similar proposals, see MacKay et al, above n 127; Lumley, Martin and Antonopoulos, above n 156.

forms of non-compliance. The agency would also be responsible for coordinating regular review of the restrictions and issuing reports on their success in reducing children's exposure to unhealthy food marketing.

Phase three represents an intrusive form of government intervention, akin to the legislative controls on tobacco promotion in Australia. Phase three controls would face significant industry resistance, and would bring into play many of the concerns about the political feasibility of statutory regulation outlined above. Other jurisdictions have introduced wide-ranging bans on food advertising to children,²³³ illustrating that similar measures in Australia are not entirely outside the realm of possibility. However, the true importance of phase three lies in the fact that it provides the threat that would motivate industry to comply with softer regulatory options, so as to ward off the possibility of more stringent legislative controls. According to the theory of responsive regulation, the threat of intrusive regulatory options would give government greater bargaining power with industry when implementing phases one and two, and would assist in securing compliance with an improved regulatory scheme. Without the threat of intrusive measures, industry has few incentives to participate in the expansion of the existing scheme and to comply with more demanding standards for food marketing to children.

VII CONCLUSION

This paper has outlined a range of loopholes in the terms and conditions of the *RCMI* and *QSRI*, as well as substantial limitations in the processes of administering, monitoring, and enforcing the codes. The food industry's failure to meet standards of best practice for self-regulation, combined with its lack of responsiveness to critiques of the scheme, provide a strong argument for government intervention in these voluntary pledges. However, there are significant political barriers to statutory regulation of food advertising to children in Australia. Accordingly, this paper proposes a dynamic regulatory strategy that strengthens the *RCMI* and *QSRI* through the use of 'regulatory scaffolds' that would buttress the scheme with progressively more demanding requirements. The key recommendations included in this proposal are to close off the gaps in the codes' substantive terms and conditions, and to increase the transparency and accountability of the scheme by opening up processes of monitoring and enforcement to external participation. Government leadership and oversight will be critical to the process of strengthening regulatory controls on food advertising, including threatening industry with more intrusive measures, should a co-regulatory scheme fail to reduce children's exposure to unhealthy food marketing. This strategy endorses a responsive regulatory approach that begins with voluntary action by the food industry itself. However, it also recognises the central role of the state in regulation and describes new ways for governments to protect public health in an era of regulatory capitalism and growing innovation in the field of public health governance.

233 See above nn 23–5.

APPENDIX 1

Appendix 1: A summary of regulatory requirements for food advertising in Australia

Communication channel	Instrument	Form of regulation	Key requirements in relation to advertising
All media and marketing	Australian Consumer Law	Legislation	Food advertising must not be misleading, deceptive, or untruthful.
All advertising and marketing	<i>Australia New Zealand Food Standards Code</i>	Standards	Provides for the substantiation and approval of health and nutrition claims made in food advertising and labelling.
All advertising	Food Acts	Legislation	Food advertising, packaging, and promotion must not be misleading, deceptive, or untruthful, and must comply with the Food Standards Code.
Free-to-air television	<i>Children's Television Standards 2009</i>	Standards	Regulates the scheduling, volume, and content of advertising to children during C and P periods (periods when licensees screen programs classified as suitable for young children). Restricts the use of persuasive techniques in advertising to children, including premium offers, undue pressure, prizes, and popular characters. Food advertising must not contain any misleading or deceptive information about the nutritional quality of the product.
Free-to-air television	<i>2015 Commercial Television Industry Code of Practice</i>	Co-regulation	Provides for the classification of advertisements broadcast on free-to-air television. Regulates the amount of advertising (and other non-program material) per hour of television, as well as the clear presentation of sponsorship and other commercial arrangements. Broadcasters are 'expected to comply' with the AANA Codes and the ABAC Responsible Alcohol Marketing Code.
All media (excludes product labels, packaging, public relations, program promotions)	<i>AANA Code of Ethics</i>	Self-regulation	Regulates taste and decency in advertising, including discrimination, sexual appeal, violence, sex, sexuality and nudity, strong or obscene language, and health and safety.

Communication channel	Instrument	Form of regulation	Key requirements in relation to advertising
All media (excludes product packaging and labelling)	AANA Code for Advertising & Marketing Communications to Children	Self-regulation	Advertising must not promote inactive lifestyles or unhealthy eating and drinking habits. Prohibits advertising that draws upon peer power and regulates use of popular personalities and the presentation of premium offers. Limited to advertising aimed at children, for children's products.
All media (excludes product packaging and labelling)	AANA Food & Beverages Advertising & Marketing Communications Code	Self-regulation	Prohibits advertising that undermines parental authority, draws upon peer power, creates a misleading sense of urgency, undermines the importance of healthy/active lifestyles and balanced diets, or which encourages excess consumption. Regulates the presentation of premium offers.
Television, radio, print, cinema, internet sites (where audience is predominantly children)	Responsible Children's Marketing Initiative	Self-regulation	Advertising to children must be for 'healthier dietary choices' and promote a healthy lifestyle in advertising messaging. Regulates the use of product placement, including in interactive games, and advertising in schools.
Television, radio, newspapers, magazines, outdoor advertising, emails, interactive games, cinema, and internet sites (where audience is predominantly children)	Quick Service Restaurant Industry Initiative for Responsible Advertising and Marketing to Children	Self-regulation	Advertising for children's fast food products must be for 'healthier dietary choices' and represent a healthy lifestyle in advertising messaging. Regulates the use of product placement, including in interactive games, and advertising in schools.