



12 September 2019

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The Treasury

By email: DPIConsultation@treasury.gov.au

Dear Mr McDonald

SUBMISSION TO THE *DIGITAL PLATFORMS INQUIRY CONSULTATION*

Thank you for the opportunity to provide a submission to the Government's consultation on the final report of the Australian Competition and Consumer Commission's (ACCC) *Digital Platforms Inquiry*.

The Australian Council on Children and the Media (ACCM) strongly urges the Government to use this opportunity to regulate to keep children safe online, to protect their privacy, and stop their exposure to marketing communications for alcohol, gambling and unhealthy food.

ACCM is a peak not-for-profit national community organisation whose mission is to support families, industry and decision makers in building and maintaining a media environment that fosters the health, safety and wellbeing of Australian children.

ACCM membership includes ECA (Early Childhood Australia), ACSO (Australian Council of State Schools Organisations), APPA (Australian Primary School Principals Association), AHISA (Association of Heads of Independent Schools Australia), AEU (Australian Education Union), Parenting Research Centre, Council of Mothers' Union in Australia, SAPP (South Australian Primary Principals Association), and other state-based organisations and individuals.

ACCM's core activities include the collection and review of research and information about the impact of media use on children's development, and advocacy for the needs and interests of children in relation to media use. As part of that advocacy, we made a submission to the ACCC inquiry in January.

This submission has been written by our President, Professor Elizabeth Handsley, in consultation with our Hon CEO, Barbara Biggins OAM. It is based on a template devised by officers of the Foundation for Alcohol Research and Education, but contains a number of observations from our unique perspective as an organisation.

Children's exposure to marketing communications has been a central concern of ours for many years, and it has, as you would be aware, been the subject of considerable research. There are strong grounds to say that any marketing is inherently unfair where children are concerned, because they are unable either to distinguish it from editorial or entertainment content, or to interpret it in a sufficiently critical way, because they do not understand the persuasive intent behind it.

Marketing for unhealthy products, however, raises particular difficulties. Some products (alcohol, gambling) are so clearly recognised as unsafe for children that it is illegal for children to consume the products at all.

Therefore children should also be protected from marketing communications for the products. As to unhealthy food, there is strong evidence that its consumption undermines children's maintenance of a healthy weight; and that advertising for it plays a role in shaping children's preferences and consumption. The need to restrict children's exposure to such advertising is widely accepted, even by industry (though not all parties agree on the form such restrictions should take).

The World Health Organisation's *Recommendations on the Marketing of Foods and Non-Alcoholic Beverages to Children*¹ were built around measures to limit children's **exposure** to unhealthy advertising, and we endorse this approach. Too many advertising restrictions developed in the name of protecting children are of limited effectiveness because they turn on a judgment about whether a particular message is aimed or directed at children, rather than on the impact it is likely to have on children who encounter it. The question should be about the actual audience for particular content, on particular platforms at particular times, and not on the (ostensible) target audience.

Core Principles

In responding to the ACCC's recommendations, we urge the government to be guided by four principles.

1. Children should be safe online. A strong regulatory framework to protect children from unhealthy marketing, including alcohol, unhealthy food and gambling, should be applied to all media formats, including digital platforms.
2. Children should not be tracked, surveilled and monetised, and nor should children's data should be collected, disclosed or used for any profiling or marketing purposes.
3. Digital platforms must comply with the law and societal standards and an independent regulator should ensure proactive monitoring of platforms to ensure compliance, backed by strong enforcement with meaningful sanctions.
4. Public interest journalism, including health journalism, is important to Australia and it should be supported and fostered.

Unhealthy marketing must be addressed as a priority in a harmonised media regulatory framework (ACCC Recommendation 6)

The interests of the child and protection of vulnerable consumers should be foremost considerations of the proposed platform-neutral harmonised media regulatory framework.

Other submissions you receive will detail the proliferation and effect of unhealthy marketing, including predatory practices associated with it, and the failure of self-regulatory systems to provide appropriate community safeguards. Such a state of affairs cries out for decisive governmental action, and shows that the time for reliance on industry self-regulation is over. Indeed, government regulation is more needed than ever as the power and opacity of modern digital platforms become better understood.

ACCM understands 'harmonised' to mean something other than 'undifferentiated'. A harmonised framework is one where all platforms are regulated in the way most appropriate for them and in the public interest, with an eye to creating a system that is coherent overall. The alternative is the risk of a 'race to the bottom' where regulation is downgraded on some platforms because a similar level is not possible or feasible on others. In such a case the public interest to be served by regulation becomes sacrificed to an abstract concept with only superficial appeal.

¹ WHO, *Set of Recommendations on the Marketing of Foods and Non-Alcoholic Beverages to Children* (2010), <http://www.who.int/dietphysicalactivity/marketing-food-to-children/en/>.

At the same time there is a strong case for a single regulator of marketing, precisely to ensure the kind of coherence needed in a harmonised regulatory framework. We submit this should be a body charged with consumer protection rather than with media regulation as such. In other words, we recommend the power be given to the ACCC rather than the ACMA. We believe the ACCC is the body best placed to maintain the perspective of the best interests of children and young people as media consumers, and of the need to curb the power of large corporations that put profits ahead of the public good. Its solid track record in pursuing food companies for misleading marketing (as illustrated most recently in the *Heinz* case) supports this position.

Recommendation six in the ACCC's report considers that the framework should contain "appropriate monitoring and enforcement mechanisms accompanied by meaningful sanctions." As there is not currently any regulator monitoring on broadcast media, the experience there provides a useful illustration of why monitoring is so important, and of the desirability of concentrating the regulatory function in the ACCC which is already set up to engage in it.

The necessity of meaningful sanctions should go without saying, but unfortunately the point needs to be made. When there is no sanction there is no incentive to comply, no matter how high a level of compliance a self-regulatory regime might be able to claim after the fact. Considering that most advertising campaigns are intended to last only a few weeks, the time it takes to determine a complaint is usually all that is needed for the advertiser to achieve its aims, so it is quite willing to suffer a 'slap on the wrist' from a self-regulatory body after the campaign is over. We draw your attention to the following quotation from a pizza shop that was the subject of a complaint to the Advertising Standards Board (as it was then known) in 2011:

We can understand how [the ad] may have caused a slight stir amongst the passersby. To be honest, we were hoping to ruffle a few feathers. ... In whichever way the board decides, we will be happy. We have been happy to run this ad for as long as we have and with such a great response.²

The order and scope of the stepped reforms are important. Advertising restrictions, and specifically unhealthy marketing, were identified as a key area of regulatory disparity. They also are of broad concern, have high impact on the Australian community and require strong regulation. ACCM supports the prioritisation of alcohol, gambling and unhealthy food advertising as the first step of the staged regulatory reforms. Starting with this area of advertising would see the development of the most comprehensive initial regulatory architecture that could then be adapted to other areas of advertising as appropriate.

Recommendation for implementation:

- 1. Mandatory regulatory settings to protect children and vulnerable groups from unhealthy marketing must be established and made coherent across media platforms, including digital platforms, in the first stage of the media regulation reform process.**

Improving the public's digital media literacy must not occur in isolation (ACCC recommendations 12 and 13)

ACCM broadly supports the ACCC's recommendations to establish a government digital media literacy program, and to include digital media literacy in schools for consideration as part of the upcoming Australian Curriculum review.

² Advertising Standards Bureau, Case Report 0238/11.

Media literacy education should focus on broader media literacy issues, such as digital marketing, not just news literacy. Media literacy is a key skill that young people need to develop in order to be able to critically engage with media and the increasing barrage of marketing messages.

However, these recommendations must support a comprehensive regulatory framework and cannot be used as a standalone solution. This is the case particularly because children start to be influenced by advertising and marketing well before they start school, and indeed before they are amenable to any kind of 'literacy training'.

Recommendation for implementation:

- 2. Programs to improve media literacy should include marketing literacy, and the identification of digital marketing techniques and tricks.**

Data should not be collected and used in ways that damage vulnerable groups including children (ACCC recommendations 16, 17, 18)

ACCM broadly supports the ACCC's recommendations to support increased privacy and more meaningful choice and control for consumers relating to their data. We are particularly concerned about growing research evidence that apps popular with children are covertly tracking them and gathering personal data that is then onsold to marketers. Recent research evaluating the privacy behaviours of Android apps has found that a majority are potentially in violation of the *Children's Online Privacy Protection Act*.³ Australian law should supply more effective protection in light of these findings.

The priority is the protection of children and ending the exploitative data practices of both the digital platforms and other corporate entities. Children are not a product. Children should not be turned into data points, packaged and sold to the highest bidder. While we strongly support an enforceable privacy code for the digital platforms, we believe that the restrictions proposed for children's data should extend beyond the digital platforms to other commercial entities dealing in children's personal information.

Recommendation for implementation:

- 3. The Digital Platforms Privacy Code should be developed in consultation with community and health organisations and implemented as a matter of priority.**
- 4. The government should specifically prohibit the collection, use and disclosure of children's data for targeted advertising and/or online profiling. This restriction should apply to online and offline entities.**

The specialist digital platforms branch to be established within the ACCC must proactively investigate, monitor and enforce arising consumer harms (Recommendation 4)

ACCM supports the introduction of a specialist digital platforms branch within the ACCC as such a branch will accumulate knowledge and connections in this subject area. The ACCC has expressed an interest in working closely with other relevant agencies including the OAIC and the ACMA as well as international agencies. We support this proposed coordination.

The ACCC flagged its concern for vulnerable consumers in the Report. ACCM believes that the branch should investigate consumer harms arising from the predatory marketing tactics of alcohol, gambling and

³ Reyes, I., Wijesekera P., Reardon J., Elazari A., Razaghpanah A., Vallina-Rodriguez N., et al. (2018). "Won't Somebody Think of the Children" Privacy Analysis at Scale: A Case Study With COPPA. Proceedings on Privacy Enhancing Technologies. <https://www.icsi.berkeley.edu/icsi/node/6013>

unhealthy food companies, and user generated content, for example undisclosed influencer marketing, as well as data privacy of vulnerable consumers.

We support the collection of data from digital platforms for the purposes of investigating, monitoring and enforcing issues within the markets that digital platforms operate in. Public reporting should be conducted on issues not meeting the threshold of breaching the *Competition and Consumer Act*.

Recommendation for implementation:

- 5. The specialist regulatory branch within the ACCC should be established immediately and be tasked with investigating consumer harms. Dedicated funding should be provided to the ACCC to support the establishment and operation of the specialist branch.**

Broader structural reform is required to address consumer rights and protections (additional recommendation)

The Report does not question whether the collection, usage and analytics of consumer data is a legitimate market and stops short of proposing structural reform to how the digital platforms monetise consumer data.

The ACCC acknowledged that the problematic data practices are not limited to the digital platforms. The ACCC also noted concerns with current practices, including the potential for “a seller to use their knowledge of consumers to target vulnerable consumers or discriminate against customers on the basis of gender, race or sexual orientation.” We expect that you will receive submissions detailing troubling instances of data practices that target vulnerable consumers. Such practices need to be addressed, urgently.

ACCM strongly supports a separate inquiry into the broader issues of the collection and use of consumer data, with a particular focus on vulnerable consumers. The inquiry should consider any social harms emerging from data practices and whether there should be limitations placed on data collection and usage across the economy. The establishment of such an inquiry should not preclude the privacy recommendations from the Report being implemented. These recommendations generally tackle the issues at an individual level, which is still required in addition to structural reform.

Recommendation for implementation:

- 6. An inquiry be held into the broader issues of the collection and use of consumer data, with a particular focus on vulnerable consumers and societal harm. The establishment of such an inquiry should not preclude the privacy recommendations from the Report being implemented, such as the Digital Platforms Privacy Code.**

Additional support is needed for health and science journalism (ACCC recommendations 10 and 11)

ACCM broadly supports the proposals to provide additional support for public interest journalism. We support the moves to enhance rural journalism, but more support is needed for health and science journalism. Health and science journalism is not a niche area. In fact it is crucial in ensuring the public is informed on matters such as the impact of food advertising on children’s food preferences and consumption. It should be fostered and not be left solely to digital natives such as Croakey.

The Report focuses on the quantity of reporting, rather than the quality of reporting. Further consideration should be given to providing support for quality journalism and for monitoring poor journalism and preventing misinformation.

Recommendation for implementation:

- 7. Health journalism, in addition to local journalism, should be given additional funding and support. Grants are a positive start, but over the medium-term these should be replaced with sustained and ongoing resources.**

All Recommendations:

- 1. Mandatory regulatory settings to protect children and vulnerable groups from unhealthy marketing must be established and made coherent across media platforms, including digital platforms, in the first stage of the media regulation reform process.**
- 2. Programs to improve media literacy should include marketing literacy, and the identification of digital marketing techniques and tricks.**
- 3. The Digital Platforms Privacy Code should be developed in consultation with community and health organisations and implemented as a matter of priority.**
- 4. The government should specifically prohibit the collection, use and disclosure of children's data for targeted advertising and/or online profiling. This restriction should apply to online and offline entities.**
- 5. The specialist regulatory branch within the ACCC should be established immediately and be tasked with investigating consumer harms. Dedicated funding should be provided to the ACCC to support the establishment and operation of the specialist branch.**
- 6. An inquiry be held into the broader issues of the collection and use of consumer data, with a particular focus on vulnerable consumers and societal harm. The establishment of such an inquiry should not preclude the privacy recommendations from the Report being implemented, such as the Digital Platforms Privacy Code.**
- 7. Health journalism, in addition to local journalism, should be given additional funding and support. Grants are a positive start, but over the medium-term these should be replaced with sustained and ongoing resources.**

Thank you once again for the opportunity to raise these important issues with you. We welcome the prospect of meeting with the Structural Reform Division to discuss these matters further.

Yours sincerely

Elizabeth Handsley
President