



## **Obesity Policy Coalition submission to the Australian Consumer & Consumer Commission – April 2022**

### **Digital Platform Services Inquiry – Updating competition and consumer law for digital platform services**

#### **Background**

The Obesity Policy Coalition (OPC) is a partnership between Cancer Council Victoria, Diabetes Victoria, VicHealth and the Global Obesity Centre at Deakin University; a World Health Organization (WHO) Collaborating Centre for Obesity Prevention. The OPC advocates for evidence-based policy and regulatory change to address overweight, obesity and unhealthy diets in Australia, particularly among children. We welcome the opportunity to provide our views in response to the Digital Platform Services Inquiry's discussion paper on updating competition and consumer law for digital platform services.

The OPC's key focus in this area is on children's exposure to unhealthy food marketing online and the use of children's data and personal information to target and enhance its reach and influence. Children should be able to be online and use social media without being exposed to marketing that is harmful to their health, including marketing of unhealthy food. We know that digital media is an important part of children's daily lives, with Australian children going online as part of their education, to access information of all kinds, to communicate with their friends and family, and for entertainment.

Instead of an environment that promotes their health and wellbeing, when children go online they are often bombarded with sophisticated digital marketing campaigns for unhealthy food. These campaigns use technologies and delivery systems designed and supported by powerful online platforms and social media companies, to harness children's data and personal information to enable marketing to be highly targeted, engaging and effective.

There is clear and robust evidence that children's exposure to unhealthy food marketing influences their food choices, influences their diets, and can contribute to poor diets, overweight and obesity.<sup>1</sup> Despite the high number of Australian children above a healthy weight, there are few controls on marketing practices targeting advertisements for unhealthy foods and beverages to children in Australia.

We strongly advocate for broad government regulation to ensure children are fully protected from digital marketing of unhealthy food. The Australian Government has an important role to play in protecting children online and creating an environment that restricts commercial exploitation of children and enables children to participate as digital citizens, while having their best interests protected. Our community expects and supports government action in this area. We welcome the ACCC's consideration of this issue as part of this inquiry and in its consideration of regulatory reform.

We provide the following responses to relevant consultation questions:

### **Response to question 1: What competition and consumer harms, as well as key benefits, arise from digital platform services in Australia?**

A key consumer harm arising from digital platform services in Australia is how those platforms facilitate children's exposure to harmful marketing, including marketing for unhealthy food and drinks. This issue was highlighted by the OPC and other public health organisations in the Digital Platforms Inquiry and noted by the ACCC in its final report.

Australian children are active digital citizens and participate in the digital environment in many of the same ways adults do – to learn, communicate and for entertainment. We know that children are accessing platforms that offer a wide range of content for all ages, not just child specific content.<sup>ii</sup> Social media platforms popular with children include YouTube, TikTok, Instagram, Snapchat and Facebook, as well as online gaming.<sup>iii</sup> Australian children also spend significant amounts of time online and, as they do so, are often exposed to large amounts of unhealthy food marketing. Australian research shows that Australian teens aged 13-17 years are exposed to almost 100 online promotions for unhealthy food every week.<sup>iv</sup> The types of marketing that children see online and on social media include paid advertising, for example in social media feeds or on a webpage; brand owned content, for example on a brand's own social media page, and that can then be promoted or shared; branded apps and games; content created or shared by influencers and content shared by friends, among others.<sup>v</sup>

While children are on these platforms and social media sites there are few protections in place to prevent them from being exposed to harmful marketing and from harmful data practices. With half of all global advertising spending spent online, online platforms and social media are key spaces for commercial marketing.<sup>vi</sup> In addition to the cost effectiveness of marketing online, the reach and access companies have to consumer information is unprecedented. Online platforms can collect, use and disclose large amounts of personal information, including specific information about an individual's online behaviour, purchase preferences, social networks and physical location.<sup>vii</sup> This information is being used by marketers, including corporations who market unhealthy food, to target their marketing directly to particular groups of consumers, including children, based on their individual profiles.<sup>viii</sup> This poses a significant risk to children's privacy, health and wellbeing, particularly as it is difficult to monitor and to prevent.

The marketing of harmful industries, like unhealthy food and drinks, alcohol and gambling, is particularly concerning. Unhealthy food marketing has been shown to impact strongly on food preferences and consumption patterns.<sup>ix</sup> Children are particularly susceptible to marketing messages and there is now broad acceptance that exposure to unhealthy food marketing is a risk factor for the development of childhood obesity.<sup>x,xi</sup> It is now recognised that the impact of digital marketing on all children, including teenagers, is significant. Adolescents are likely to have access to money making them an attractive target for marketers. In the past it was assumed that adolescents had the cognitive capacity to recognise advertisements and their persuasive intent, however previous analysis didn't consider the unique emotional, implicit and social impact of digital marketing. Adolescents are susceptible because of neurological and hormonal changes which cause them to be more subject to peer influence, including risky decision making.<sup>xii</sup> It is accordingly crucial to consider the vulnerability of teenagers as well as younger when considering the online harms.

In light of the evidence, the World Health Organization (WHO) has called for countries to implement effective controls to limit children's exposure to unhealthy food marketing, to

reduce their risk of a poor diet, weight gain and chronic disease.<sup>xiii</sup> This is now reflected in Australia's National Obesity Strategy, which includes a strategy to reduce exposure to unhealthy food marketing, promotion and sponsorship especially for children.<sup>xiv</sup>

There is also growing recognition on the importance of action to address digital marketing. For example, the UN Committee on the Rights of the Child has released its General Comment on children's rights in the digital environment, a broad framework to ensure children are protected online while still being able to participate. This includes that States should prohibit digital profiling or targeting of children for commercial purposes and that targeted or age inappropriate digital marketing should be regulated to prevent children's exposure to the promotion of unhealthy products, including certain food and drinks.<sup>xv</sup>

We support broad government regulation to ensure Australian children are not exposed to any digital marketing of unhealthy food.

**Recommendation: Children should not be exposed to any unhealthy food marketing when online or using social media.**

### Vulnerable individuals

As well as protections for children, we support the introduction of regulation to address the digital marketing model and the way it collects, uses and discloses personal information or other data that may target particular individuals in a way that may be more likely to result in harm. This is particularly the case for marketing of harmful products. It is important that this must be done in a way that does not enable or encourage the collection, use or disclosure of additional personal and sensitive information in order to identify a user as vulnerable.

For example, in our submission to the review of the *Privacy Act 1988* (the Privacy Act), we recommended that it be amended to prohibit the collection, use or disclosure of personal information related to a person's physical or mental health and wellbeing or financial situation, for the purposes of marketing harmful products. Similar protections could be considered as part of this Inquiry and as part of reforms to consumer law.

### **Response to question 2: Do you consider that the CCA and ACL are sufficient to address competition and consumer harms arising from digital platform services in Australia, or do you consider regulatory reform is required?**

No, we do not consider that the CCA and ACL are sufficient to address consumer harms arising from digital platform services in Australia, in particular harms caused by exposure to harmful marketing, as described above. Regulatory reform is required to protect children and other vulnerable users from exposure to harmful marketing, and from the use of their personal information and data to deliver and target harmful marketing.

### **Responses to questions 3, 4 and 5: Law reform and regulatory tools**

We support the adoption of a broad framework to address harms identified across different digital platform services. This framework must address children's exposure to harmful marketing and protect children from it in all forms and in all digital environments.

We do, however, acknowledge that any framework will need to be updated as new issues arise. This is particularly the case in the digital environment due to the constant development of new technologies and practices. While protections must be developed to be future proofed as far as possible, the framework must also require and enable regular review and

amendment to ensure desired outcomes are maintained over time, and that new issues are addressed.

OPC is focused on the outcome of ensuring that children are not exposed to harmful marketing, including unhealthy food marketing, when online. In terms of the appropriate regulatory tool to achieve this, we support a mandatory approach applying to all digital marketing that is developed by government and enacted in legislation. We strongly oppose a voluntary approach and any approach that relies on the advertising or food and beverage industry to develop or administer a code of practice.

In Australia, the food and advertising industries have been allowed to set their own rules for when they can market unhealthy food to children. We have seen, over time, that these industry codes are not effective in protecting children. Self-regulation has been shown to be ineffective in reducing children's exposure to unhealthy food marketing in any meaningful way in Australia and around the world.<sup>xvi</sup> As a result we strongly support comprehensive government regulation to effectively protect children from unhealthy food marketing, including online and on social media. In our view, in order to effectively protect children online, no digital marketing of unhealthy food should be permitted unless it can be guaranteed that children will not be exposed to it.

We do support alignment with overseas jurisdictions where those regulatory approaches are consistent with best practice. It is important that Australia adopt regulation that represents best practice and will achieve outcomes that will protect consumers from harm, even where this means going beyond what has been implemented in some overseas jurisdictions

**Recommendation: The Australian Government must introduce comprehensive, mandatory regulation to protect children from unhealthy food marketing. This should ensure children are not exposed to any unhealthy food marketing when online or using social media.**

### **Responses to questions 8, 9 and 10 and general comments: Use of data**

We recommend that the ACCC consider and report on the harms to children caused by the collection, use and disclosure of children's data by digital platforms generally, including specific consideration of the harms caused in relation to exposure to harmful marketing such as for unhealthy food and drinks.

In relation to the use of data, we ask the ACCC to recommend that:

- children's personal information and data cannot be collected, used or disclosed by digital platforms for marketing purposes. It is important that this applies to all children and cannot be overridden by parental consent. Where such marketing is not for harmful products, this may be subject to some exceptions where it is in children's best interests, such as for public health social marketing campaigns.
- harmful industries, including unhealthy food, alcohol and gambling, cannot collect, use or disclose children's personal information or data for the purposes of analysing or influencing children's behaviour or decisions in any circumstances.
- tracking, profiling or monitoring the behaviour of children for commercial purposes online should not be permitted.

We also ask the ACCC to consider the harm caused by the collection, use and disclosure of data by digital platforms that may enable particular individuals to be targeted with marketing

in a way that may be more likely to result in harm. This is particularly the case for marketing of harmful products. We ask the ACCC to consider how the use of data in this way can be stopped without enabling or encouraging the collection, use or disclosure of additional personal and sensitive information in order to identify a user as vulnerable. For example, in our submission to the review of the Privacy Act, we recommended that the Act be amended to prohibit the collection, use or disclosure of personal information related to a person's physical or mental health and wellbeing or financial situation, for the purposes of marketing harmful products. Similar protections could be considered as part of this Inquiry and as part of reforms to consumer law.

We also ask the ACCC to consider harms caused by the collection, use and/or disclosure of adult individual's personal information or data for the purposes of commercial marketing without express consent. This is particularly important in the case of commercial marketing for harmful products, including unhealthy food, alcohol and gambling. We ask the ACCC to recommend that express consent be required for digital platforms to collect, use or disclose an individual's personal information or data for commercial marketing purposes, particularly in terms of marketing for unhealthy food and drinks. We also ask the ACCC to consider what additional protections should be required to ensure data is used in a way that does not cause or promote harm and is fair and reasonable in the circumstances.

In relation to the ACCC's discussion on expansion of data access, the OPC is concerned about any expansion of data access and its possible impact on children's exposure to harmful marketing, as well as for other vulnerable individuals. We note the ACCC's statement in the discussion paper that '*...the design and implementation of such measures would require careful consideration to ensure they include appropriate safeguards to protect consumers' privacy*' (p79) and that '*...any sharing and use of personal data should be accompanied by robust consumer-level controls that limit the privacy risks of data sharing and use.*' (p92) We strongly agree that such protections and consents are required, however in our view extra protections must be put in place to protect children. The protections listed above must extend to any reforms that enable expanded access to or portability of data, ensuring data cannot be accessed or transferred for the above purposes.

**Recommendation: Certain practices should not be permitted in relation to children, including:**

- collecting, using or disclosing children's personal information or data for the purposes of commercial marketing, particularly marketing by harmful industries, including unhealthy food and drinks, alcohol and gambling. Parental consent should not be an option for enabling this. For marketing that is not for harmful products, some limited exceptions may be appropriate where such practices might overall be in children's best interests and do not put children at risk of harm. For example, public health social marketing campaigns.
- harmful industries, including unhealthy food, alcohol and gambling, cannot collect, use or disclose children's personal information or data for the purposes of analysing or influencing children's behaviour or decisions in any circumstances. No exceptions should apply and parental consent cannot be obtained to enable this.
- tracking, profiling, or monitoring the behaviour of children for commercial purposes online.

**Recommendation: Certain protections should apply to adult users of digital platforms:**

- An individual's data or personal information cannot be collected, used or disclosed by or using digital platforms for the purposes of commercial marketing without express consent, particularly in the case of marketing for harmful industries, including unhealthy food. This consent must be clear, voluntary, specific and unincentivised, and provided on an opt-in basis.
- Digital platforms cannot collect, use or disclose (or enable collection, use or disclosure to occur) personal information or data related to a person's physical or mental health and wellbeing or financial situation, for the purposes of marketing harmful products, including unhealthy food.

**Response to question 11: What additional measures are necessary or desirable to adequately protect consumers against:**

**a) the use of dark patterns online**

**b) scams, harmful content, or malicious and exploitative apps?**

We ask the ACCC to consider consumer harms in the context of how digital platforms facilitate children's exposure to harmful marketing online, including unhealthy food marketing. As outlined in response to earlier questions, we strongly support the introduction of measures to protect children from exposure to harmful marketing online, in particular marketing of unhealthy food.

In our view, in order to effectively protect children online, no digital marketing of unhealthy food should be permitted unless it can be guaranteed that children will not be exposed to it.

As well as this broad protection, we strongly advocate for the introduction of protections for children's privacy and the use of children's data and personal information for the purposes of marketing, including unhealthy food marketing. We have outlined the protections we seek in response to earlier questions on the use of data, including that children's personal information and data cannot be used for the purposes of harmful industry marketing, including unhealthy food marketing, and that children cannot be tracked, profiled or have their behaviour monitored online for commercial purposes.

We also ask the ACCC to consider how digital platforms can and should protect users' privacy and data by design. For example, by recommending protections to ensure any notices given to or consents given by digital platform users are clear, comprehensive and designed on an opt-in basis to protect consumer data and privacy and not to encourage or incentivise a user to agree. We have discussed these issues and made more detailed recommendations in recent submissions on the Online Privacy Bill, the Privacy Act Review, and the Senate Inquiry into Social Media and Online Safety, and have reiterated some of our recommendations as part of this submission.

We note that the consultations on the Online Privacy Bill and the Privacy Act Review were primarily focused on the collection, use and disclosure of personal information, including children's personal information, rather than exposure to harmful marketing and harmful data practices in a general sense. While important and significant changes, we highlight that, those reforms will not be sufficient to effectively protect children from exposure to digital marketing of unhealthy food in all areas. Comprehensive regulation is needed to protect Australian children and ensure they can fully participate in the digital environment in an

environment that supports their health and wellbeing. We welcome the ACCC's consideration of this important issue.

**Response to question 12: Which digital platforms should any new consumer protection measures apply to?**

In our view, new consumer protection measures to protect children from harmful marketing should apply to all types of digital marketing, including all digital platforms and social media companies. This is important to ensure the protections are comprehensive and effective in protecting children online.

**Response to question 13: Should digital platforms that operate app marketplaces be subject to additional obligations regarding the monitoring of their app marketplaces for malicious or exploitative apps? If so, what types of additional obligations?**

All protections that apply to digital platforms to protect children from harmful marketing, must also apply to all apps. This means that apps cannot be used to expose children to harmful marketing, including unhealthy food marketing.

**Response to question 16: Increased transparency**

**In what circumstances, and for which digital platform services or businesses, is there a case for increased transparency including in respect of price, the operation of key algorithms or policies, and key terms of service?**

**a) What additional information do consumers need?**

**b) What additional information do business users need?**

**c) What information might be required to monitor and enforce compliance with any new regulatory framework?**

While the role of data in developing and delivering marketing continues to grow, there is little requirement for organisations to report on digital marketing practices, and on the overall digital marketing model generally. Transparency is important to ensure that online platforms are accountable for the harm caused by the digital marketing model and for specific forms of harmful marketing, including by unhealthy food, gambling and alcohol companies.

We recommend that digital platforms should be required to disclose information or report on how they collect, use and disclose data and personal information for the purposes of marketing. This must extend to information on how automated systems and algorithms are used to deliver marketing to individuals or groups of individuals. The detail of what should be provided and when should be subject to further consultation with public health and digital rights organisations.

**Recommendation: Digital platforms should be required to disclose information or report on how they collect, use and disclose individuals' data and personal information for the purposes of marketing, including how automated systems and algorithms are used to delivery marketing to individuals or groups of individuals.**

## References

- <sup>i</sup> Food marketing exposure and power and their associations with food-related attitudes, beliefs and behaviours: a narrative review. Geneva: World Health Organization; 2022. Licence: CC BY-NC-SA 3.0 IGO.
- <sup>ii</sup> Mascheroni G, Olafsson K, Met children go mobile. Risks and Opportunities. 2nd edition. Milan; Educatt; 2014.
- <sup>iii</sup> VicHealth (2020), Under the radar: Harmful industries' digital marketing to Australian children. A report prepared by the Victorian Health Promotion Foundation, Melbourne. <https://doi.org/10.37309/2020.CI910>. See p7.
- <sup>iv</sup> Kelly, B., Bosward, R., & Freeman, B. (2021). Australian Children's Exposure to, and Engagement With, Web-Based Marketing of Food and Drink Brands: Cross-sectional Observational Study. *Journal of medical Internet research*, 23(7), e28144. <https://doi.org/10.2196/28144>
- <sup>v</sup> VicHealth (2020), Under the radar: Harmful industries' digital marketing to Australian children. A report prepared by the Victorian Health Promotion Foundation, Melbourne. <https://doi.org/10.37309/2020.CI910>. See discussion of types of digital marketing on page 13.
- <sup>vi</sup> Enberg J. Global digital ad spending 2019. Available from: <https://www.emarketer.com/content/global-digital-ad-spending-2019>.
- <sup>vii</sup> World Health Organisation Regional Office for Europe, *Tackling food marketing to children in a digital world: trans-disciplinary perspectives* (2016), page 8.
- <sup>viii</sup> World Health Organisation Regional Office for Europe, *Tackling food marketing to children in a digital world: trans-disciplinary perspectives* (2016), pages 8-9.
- <sup>ix</sup> Food marketing exposure and power and their associations with food-related attitudes, beliefs and behaviours: a narrative review. Geneva: World Health Organization; 2022. Licence: CC BY-NC-SA 3.0 IGO.
- <sup>x</sup> Cairns G, Angus K, Hastings G. The extent, nature and effects of food promotion to children: a review of the evidence to December 2008. Geneva: World Health Organization; 2009 ([https://www.who.int/dietphysicalactivity/Evidence\\_Update\\_2009.pdf](https://www.who.int/dietphysicalactivity/Evidence_Update_2009.pdf), accessed 18 November 2021).
- <sup>xi</sup> Hastings G, Stead M, McDermott L, Forsyth K, MacKintosh A-M, Rayner M et al. Review of research on the effects of food promotion to children. Glasgow: University of Strathclyde, Centre for Social Marketing; 2003.
- <sup>xii</sup> Knoll LJ, Magis-Weinberg L, Speekenbrink M, Blakemore SJ. Social influence on risk perception during adolescence, *Psychol Sci* 2015;26:583–92.
- <sup>xiii</sup> World Health Organization. Set of recommendations on the marketing of foods and non-alcoholic beverages to children. Geneva: World Health Organization, 2010, endorsed by the World Health Assembly, of which Australia is a member, in 2010: [http://apps.who.int/iris/bitstream/10665/44416/1/9789241500210\\_eng.pdf](http://apps.who.int/iris/bitstream/10665/44416/1/9789241500210_eng.pdf).
- <sup>xiv</sup> National Obesity Strategy 2022-2032, Available at: <https://www.health.gov.au/resources/publications/national-obesity-strategy-2022-2032>.
- <sup>xv</sup> United Nations Committee on the Rights of the Child, *General comment No. 25 (2021) on children's rights in relation to the digital environment*, Available at: <https://www.ohchr.org/EN/HRBodies/CRC/Pages/GCChildrensRightsRelationDigitalEnvironment.aspx>
- <sup>xvi</sup> Galbraith Emami S and Lobstein T. The impact of initiatives to limit the advertising of food and beverage products to children: a systematic review. *Obes Rev.* 2013 Dec;14(12):960-74; Chambers SA, Freeman R, Anderson AS, MacGillivray S. Reducing the volume, exposure and negative impacts of advertising for foods high in fat, sugar and salt to children: A systematic review of the evidence from statutory and self-regulatory actions and educational measures. *Prev Med.* 2015;75:32-43; Ronit K, Jensen JD. Obesity and industry self-regulation of food and beverage marketing: a literature review. *Eur J Clin Nutr.* 2014;68(7):753-9; Jensen JD, Ronit K. The EU pledge for responsible marketing of food and beverages to children: implementation in food companies. *Eur J Clin Nutr.* 2015;69(8):896-901; Clark H, Coll-Seck AM, Banerjee A, Peterson S, Dalglis SL, Ameratunga S, et al. A future for the world's children? A WHO-UNICEF-Lancet Commission. *Lancet.* 2020;395(10224):605-58; Watson, W L et al, Advertising to children initiatives have not reduced unhealthy food advertising on Australian television. *Journal of Public Health.* 2017. 1-6; King L, Hebden L, Grunseit A, Kelly B, Chapman K, Venugopal K. Industry self regulation of television food advertising: responsible or responsive? *Int J Pediatr Obes.* 2011;6(2-2):e390-8.