

HOLDING FOOD COMPANIES RESPONSIBLE FOR UNHEALTHY FOOD MARKETING TO CHILDREN: CAN INTERNATIONAL HUMAN RIGHTS INSTRUMENTS PROVIDE A NEW APPROACH?

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Public health advocates argue that unhealthy food marketing to children infringes children's rights, given its link to obesity, and that states have an obligation under the UN Convention on the Rights of the Child ('UNCRC') to protect children from such marketing. This article explains how international human rights concepts could be used to impose obligations directly on companies to modify their practices to protect children from unhealthy food marketing. We draw on the global governance framework that creates human rights obligations for businesses, and evaluate voluntary codes and initiatives on responsible marketing to children in Australia, to see whether they satisfy the obligations imposed under this framework and the UNCRC. Finding significant limitations in these measures, we set out recommendations for how the food industry could take an approach to food marketing that places children's best interests as a primary consideration.

I INTRODUCTION

Obesity and overweight represent a significant threat to children's health. Between 1980 and 2013, the prevalence of childhood overweight and obesity increased by 47 per cent worldwide,¹ and globally, at least 170 million children and adolescents (aged under 18 years) are overweight or obese.² In Australia, approximately a quarter of children are overweight or obese, representing a 50

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1 Marie Ng et al, 'Global, Regional, and National Prevalence of Overweight and Obesity in Children and Adults during 1980–2013: A Systematic Analysis for the Global Burden of Disease Study 2013' (2014) 384 *Lancet* 766, 770.

2 World Health Organization, 'Prioritizing Areas for Action in the Field of Population-Based Prevention of Childhood Obesity: A Set of Tools for Member States to Determine and Identify Priority Areas for Action' (Report, World Health Organization, 2012) 11.

per cent increase since 1980.³ Excess weight gain increases the likelihood of children developing a range of health conditions, including type 2 diabetes, fatty liver disease and sleep disorders.⁴ Childhood obesity is also a predictor of obesity in adulthood, which is linked to non-communicable diseases such as hypertension, type 2 diabetes, ischemic heart disease, and certain cancers.⁵ Accordingly, addressing childhood obesity is an important objective for protecting children's health, and for preventing obesity and non-communicable diseases (and associated health and economic costs) among a future generation of adults.⁶

Excess weight gain results from a complex range of individual-, family-, and community-level factors, as well as being determined by broader social, economic and cultural forces.⁷ However, the growing power of multinational food companies in the global food system is identified as a key 'vector' in the 'industrial epidemic' of obesity and non-communicable disease, ie, an epidemic emerging from the commercialisation (and widespread consumption) of health-damaging products.⁸ These companies manufacture foods and beverages that are high in salt, fat and/or sugar, and are often promoted to children via sophisticated marketing campaigns.⁹ Evidence suggests that unhealthy food marketing influences children's food preferences, consumption choices and dietary habits,¹⁰ with negative impacts on their health. Accordingly, unhealthy

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- 3 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.
 - 4 Megan M Kelsey et al, 'Age-Related Consequences of Childhood Obesity' (2014) 60 *Gerontology* 222, 222; T Lobstein, L Baur and R Uauy, 'Obesity in Children and Young People: A Crisis in Public Health' (2004) 5 *Obesity Reviews* 4, 4.
 - 5 Kelsey et al, above n 4; Markus Juonala et al, 'Childhood Adiposity, Adult Adiposity, and Cardiovascular Risk Factors' (2011) 365 *New England Journal of Medicine* 1876, 1876; Natalie S The et al, 'Association of Adolescent Obesity with Risk of Severe Obesity in Adulthood' (2010) 304 *Journal of American Medical Association* 2042, 2042; A S Singh et al, 'Tracking of Childhood Overweight into Adulthood: A Systematic Review of the Literature' (2008) 9 *Obesity Reviews* 474, 474.
 - 6 See, eg, World Health Organization, 'Obesity: Preventing and Managing the Global Epidemic' (Technical Report No 894, World Health Organization, 2000) 102–4.
 - 7 See, eg, Garry Egger and Boyd Swinburn, 'An "Ecological" Approach to the Obesity Pandemic' (1997) 315 *British Medical Journal* 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.
 - 8 René I Jahiel and Thomas F Barbor, 'Industrial Epidemics, Public Health Advocacy and the Alcohol Industry: Lessons from Other Fields' (2007) 102 *Addiction* 1335, 1335; 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, 2; 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, 671.
 - 9 See, eg, Moodie et al, above n 8.
 - 10 See, eg, J Michael McGinnis, Jennifer Appleton 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' (Research Report, World Health Organization, 2009); 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.

food marketing to children is identified as a key modifiable risk factor for childhood weight gain.

This article considers strategies for addressing the negative impact of the food industry on children's diet-related health, focusing specifically on how international human rights concepts could be used to encourage companies to address marketing practices that expose children to promotions for unhealthy products. Our article draws on literature that conceptualises unhealthy food marketing to children as infringing rights found in the *United Nations Convention on the Rights of the Child* ('UNCRC').¹¹ While we consider state obligations to protect and respect children's rights, our primary concern is how food companies might be held directly responsible for the adverse impact of unhealthy food marketing on children's rights. This is an issue that existing research on unhealthy food marketing to children has yet to consider in any detail. In taking this approach, we engage with a series of international instruments that aim to translate the rights contained in international treaties into concrete measures for businesses to implement in order to respect human rights. The United Nations' *Guiding Principles on Business and Human Rights* ('Guiding Principles')¹² create a detailed framework for integrating human rights considerations into the practices, policies and decision-making processes of corporations, and the *Children's Rights and Business Principles* ('the Principles') elaborate on how this approach can apply in respect of the rights of children contained in the UNCRC.¹³

Part II of the article describes the characteristics of transnational food companies in more depth, including their marketing practices in relation to children and young people, and the impact that exposure to unhealthy food marketing has on children's health. The article then explains how unhealthy food marketing to children infringes specific rights contained in the UNCRC. Part III of the article describes the global framework for holding businesses directly accountable for their human rights performance, focussing on the *Children's Rights and Business Principles*.¹⁴ We then briefly describe the regulatory environment for food marketing in Australia, including the introduction of voluntary 'initiatives' on food marketing to children by the Australian food industry. These initiatives represent the main form of action that the food industry has taken globally to address concerns about unhealthy food marketing to children. We evaluate the strengths and weaknesses of industry self-regulation on food marketing, highlighting its limitations as a child rights protection measure. We also consider whether and how companies' internal

11 *United Nations Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

12 John Ruggie, *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises: Guiding Principles on Business and Human Rights: Implementing the 'Protect, Respect and Remedy' Framework*, UN Doc A/HRC/17/31 (21 March 2011) annex.

13 United Nations International Children's Emergency Fund, *The Global Compact and Save the Children, Children's Rights and Business Principles* (2012) <https://www.unglobalcompact.org/docs/issues_doc/human_rights/CRBP/Childrens_Rights_and_Business_Principles.pdf>.

14 Businesses may also have general ethical obligations, but these are beyond the scope of this article.

policies and practices are addressing the concerns underlying these initiatives, and how food industry self-regulation might be strengthened to better respect children's rights. The article concludes by exploring the strengths and limitations of an approach that places human rights obligations directly on multinational food companies, including the risk that focusing on voluntary action by industry shifts attention away from the need for comprehensive government regulation of unhealthy food marketing to children or, at the very least, strong government leadership in the regulatory regime that governs food marketing to children.

II THE RISE OF MULTINATIONAL FOOD COMPANIES

Over the past 20 years, transnational food companies have risen to a position of dominance in the global food system, with economic globalisation and trade liberalisation spurring the rapid expansion of these companies around the world.¹⁵ In 2011, the top 10 packaged food companies accounted for 15.2 per cent of global packaged food sales,¹⁶ and the top 10 global soft drink companies accounted for 52.3 per cent of total soft drink sales, with Coca-Cola, PepsiCo and Nestlé totalling 40.4 per cent of sales between them.¹⁷ Cargill, the largest privately owned company in the US, has global sales of \$71.1 billion, controls 45 per cent of the global grain trade, and operates in 61 countries.¹⁸ The global food system can be described as an 'oligarchy' dominated by a handful of large, multinational food manufacturers, agribusinesses and retailers with highly concentrated market power.¹⁹

Transnational food companies powerfully shape the supply, demand, and consumption of food and beverage products. These companies are one of the main drivers of the increasing consumption of ultra-processed foods and sugary beverages, which are cheap, highly palatable, and sold in large portion sizes, but which are also high in energy and fat, salt and/or sugar.²⁰ Transnational food companies are moving quickly into markets in developing countries, using strategies such as foreign direct investment to increase production and sales in

15 See, eg, Phillip Baker, Adrian Kay and Helen Walls, 'Trade and Investment Liberalization and Asia's Noncommunicable Disease Epidemic: A Synthesis of Data and Existing Literature' (2014) 10 *Globalization and Health* 66; Anne Marie Thow and Ben McGrady, 'Protecting Policy Space for Public Health Nutrition in an Era of International Investment Agreements' (2014) 92 *Bulletin of the World Health Organization* 139.

16 Eleanore Alexander, Derek Yach and George A Mensah, 'Major Multinational Food and Beverage Companies and Informal Sector Contributions to Global Food Consumption: Implications for Nutrition Policy' (2011) 7 *Globalization and Health* 26, 28.

17 Ibid.

18 Mike Brady, 'Holding Corporations Accountable for the Right to Food' in George Kent (ed), *Global Obligations for the Right to Food* (Rowman & Littlefield Publishers, 2008) 89, 91.

19 David Stuckler and Marion Nestle, 'Big Food, Food Systems, and Global Health' in Areej Hassan (ed), *Food Insecurity and Disease: Prevalence, Policy and Politics* (Apple Academic Press, 2016) 231, 232.

20 Ibid; see also Moodie et al, above n 8; 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(6) *PLoS Medicine* 1.

low- and middle-income countries.²¹ This had led to a ‘nutrition transition’ in many developing countries, ie, a move away from healthier traditional diets, to ‘westernized’ diets higher in fat, salt and sugar.²² Increasing consumption of products such as fast food and sugar-sweetened beverages is in turn linked to rising levels of obesity and diabetes.²³

The global food industry also has a significant influence on policy and regulation that aims to improve nutrition and diet-related health. The food industry often plays a key role in international and national policy making, including through processes of consultation with government.²⁴ It increasingly engages in collaborative initiatives with government (and non-government) actors that have obesity prevention objectives, as with Australia’s ‘Health Star’ interpretive food labelling system.²⁵ However, the industry also lobbies against global and national initiatives that it sees as compromising its economic interests, raising a possibility of detrimental effects on laws and policies aimed at improving diet-related health.²⁶ Accordingly, whether to engage the food industry

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- 21 See Stuckler and Nestle, above n 19; Thow and McGrady, above n 15; Simon N Williams, ‘The IncurSION of “Big Food” in Middle-Income Countries: A Qualitative Documentary Case Study Analysis of the Soft Drinks Industry in China and India’ (2015) 25 *Critical Public Health* 455.
- 22 See, eg, Barry M Popkin, ‘The Nutrition Transition and Obesity in the Developing World’ (2001) 131 *Journal of Nutrition* 871.
- 23 Sanjay Basu et al, ‘Nutritional Determinants of Worldwide Diabetes: An Econometric Study of Food Markets and Diabetes Prevalence in 173 Countries’ (2013) 16 *Public Health Nutrition* 179; Mark A Pereira et al, ‘Fast-Food Habits, Weight Gain, and Insulin Resistance (the CARDIA Study): 15-Year Prospective Analysis’ (2005) 365 *Lancet* 36. There is significant debate over how to categorise food as healthy or unhealthy, and whether categorisation is a worthwhile exercise at all: see, eg, Carlos Monteiro, ‘The Big Issue is Ultra-processing’ (2010) 1 *World Nutrition* 237. Some actors, predominantly industry-based, reject the distinction between ‘good’ and ‘bad’ foods, and argue that all food products can form part of a healthy diet: see Jeffrey P Koplan and Kelly D Brownell, ‘Response of the Food and Beverage Industry to the Obesity Threat’ (2010) 304 *Journal of American Medical Association* 1487. However, a large body of scientific research identifies the growing consumption of processed products high in fat, salt and sugar (and sugar-sweetened beverages) as making a significant contribution to global population weight-gain, and to the increasing incidence of diet-related non-communicable diseases, such as diabetes: see Basu et al; Pereira et al. Further, many Australian children eat too much unhealthy food and drink too much soft drink while not meeting their recommended daily intake of fruits and vegetables, contributing to high levels of childhood obesity in Australia: see Australian Institute of Health and Welfare, ‘Australia’s Food & Nutrition’ (Report, 2012) 162–4. While the consumption of unhealthy foods and beverages may have some cultural and social benefits for children, our article is based on the assumption that states and other actors should take steps to reduce children’s consumption of unhealthy foods and beverages, defined as highly-processed products high in energy and fat, salt and sugar, but low in positive nutrients.
- 24 See, eg, Penelope Simons, ‘International Law’s Invisible Hand and the Future of Corporate Accountability for Violations of Human Rights’ (2012) 3 *Journal of Human Rights and the Environment* 5, 33; Anne Marie Thow et al, ‘Will the Next Generation of Preferential Trade and Investment Agreements Undermine Prevention of Noncommunicable Diseases? A Prospective Policy Analysis of the Trans Pacific Partnership Agreement’ (2015) 119 *Health Policy* 88, 91.
- 25 See Commonwealth of Australia, *Health Star Rating System* (6 December 2014) <<http://healthstarrating.gov.au/internet/healthstarrating/publishing.nsf/content/home>>.
- 26 See, eg, Marion Nestle, *Food Politics: How the Food Industry Influences Nutrition and Health* (University of California Press, 2002); David Miller and Claire Harkins, ‘Corporate Strategy, Corporate Capture: Food and Alcohol Industry Lobbying and Public Health’ (2010) 30 *Critical Social Policy* 564; Michele Simon, ‘PepsiCo and Public Health: Is the Nation’s Largest Food Company a Model of

in obesity prevention efforts (and how to do so effectively) is a matter of considerable debate (and research) within the public health community.²⁷

III THE PROBLEM OF UNHEALTHY FOOD MARKETING AND ITS IMPACT ON CHILDREN'S HEALTH

Children represent a key target market for food products, and food companies use sophisticated marketing strategies to promote foods and beverages to young people, often combining television advertising, digital marketing, product packaging, outdoor advertising, and marketing in schools.²⁸ The vast majority of marketing is for unhealthy foods and beverages, including sugar-sweetened breakfast cereals, soft drinks, confectionery, savoury snacks, and fast food.²⁹ Although there is debate over the causal link between food marketing and obesity, systematic reviews find moderate to strong evidence that these promotions influence children's food preferences, purchase requests, and actual consumption patterns, and in turn, children's diet-related health.³⁰ Other studies strongly suggest a causal connection between exposure to food marketing, consumption patterns and obesity, independent of other influences associated with television viewing. For example, one study found a significant association between commercial television viewing (including advertising) and increased Body Mass Index among children aged 12 years and younger, even after adjusting for exercise and eating while watching television.³¹ Accordingly,

Corporate Responsibility or Master of Public Relations?' (2011) 15 *City University of New York Law Review* 9.

- 27 See, eg, David S Ludwig and Marion Nestle, 'Can the Food Industry Play a Constructive Role in the Obesity Epidemic?' (2008) 300 *Journal of American Medical Association* 1808; 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 *The Milbank Quarterly* 259; Derek Yach et al, 'The Role and Challenges of the Food Industry in Addressing Chronic Disease' (2010) 6 *Globalization and Health* 10; Vivica I Kraak et al, 'An Accountability Framework to Promote Healthy Food Environments' (2014) 17 *Public Health Nutrition* 2467.
- 28 See McGinnis, Gootman and Kraak, above n 10; Cairns, Angus and Hastings, above n 10; Cairns et al, above n 10; Andrew Cheyne et al, 'Food and Beverage Marketing to Youth' (2014) 3 *Current Obesity Reports* 440; 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 *American Journal of Public Health* 56.
- 29 See, eg, Cairns, Angus and Hastings, above n 10, 15; Cairns et al, above n 10, 212.
- 30 In relation to questions about the causal relationship between food marketing and obesity: see, eg, Australian Communication and Media Authority, 'Review of the Children's Television Standards 2005: Final Report of the Review' (August 2009) 10–11 <<http://www.acma.gov.au/Industry/Broadcast/Television/Childrens-TV/childrens-television-standards-review>>. For systematic reviews supporting the influence of food marketing on children's health: see McGinnis, Gootman and Kraak, above n 10; Cairns, Angus and Hastings, above n 10; Cairns et al, above n 10.
- 31 Frederick J Zimmerman and Janice F Bell, 'Associations of Television Content Type and Obesity in Children' (2010) 100 *American Journal of Public Health* 334. See also B Kelly et al, 'Television Advertising, Not Viewing, Is Associated with Negative Dietary Patterns in Children' (2016) 11 *Pediatric Obesity* 158; Madeline A Dalton et al, 'Child-Targeted Fast-Food Television Advertising Exposure is Linked With Fast-Food Intake among Pre-school Children' (2017) 20 *Public Health Nutrition* 1548; Lisa

unhealthy food marketing is identified as making a small but significant contribution to childhood weight gain, among the many other factors that influence children's dietary health.

Public health and children's advocates also draw attention to the fact that advertising targeting young children is inherently exploitative, given that young children do not understand that commercials are designed to sell products, and do not have the ability to comprehend or evaluate advertising.³² Children start to distinguish between advertising and programming between the ages of four and seven, and their understanding of the persuasive nature of advertising only begins to develop around the age of eight years. In other words, children younger than eight years of age lack the cognitive capacity to distinguish between editorial and promotional content.³³ Children are able to articulate a critical understanding of advertising from around 11 or 12 years of age, but may still require prompting to distinguish between information and persuasion. Promotions via digital media may be even more problematic than those via traditional media, as children are less able to recognise advertisements on websites as compared to television advertisements, and the lack of explicit advertising cues in forms of digital promotion (eg, 'microsites' solely promoting a brand or product) increases children's difficulty in recognising advertising content.³⁴

Public health organisations and advocates have urged governments to introduce stronger restrictions on unhealthy food marketing to children. In 2010 the World Health Organization ('WHO') released a *Set of Recommendations on the Marketing of Foods and Non-alcoholic Beverages to Children*,³⁵ which called on states to introduce policy measures to reduce children's exposure to, and the persuasive power of, marketing for unhealthy food products.³⁶ Most governments have encouraged voluntary action by the food industry, rather than introduce statutory regulation on food marketing to children.³⁷ Food industry bodies have developed specific measures, usually called 'initiatives' or 'pledges', on responsible marketing to children in countries such as the United States,

M Powell et al, 'Food and Beverage Television Advertising Exposure and Youth Consumption, Body Mass Index and Adiposity Outcomes' (2017) 50 *Canadian Journal of Economics* 345.

32 Mary Story and Simone French, 'Food Advertising and Marketing Directed at Children and Adolescents in the US' (2004) 1 *International Journal of Behavioural Nutrition and Physical Activity* 3.

33 Brian L Wilcox et al, 'Report of the APA Task Force on Advertising and Children' (American Psychological Association, 20 February 2004) 5–6.

34 See Bridget Kelly et al, 'New Media but Same Old Tricks: Food Marketing to Children in the Digital Age' (2015) 4 *Current Obesity Reports* 37, 39.

35 World Health Organization, *Set of Recommendations on the Marketing of Foods and Non-alcoholic Beverages to Children* (2010) <http://apps.who.int/iris/bitstream/10665/44416/1/9789241500210_eng.pdf>.

36 The release of these Recommendations has been followed by a range of other actions on food marketing to children by international organisations. For an overview: see Vivica I Kraak et al 'Progress Achieved in Restricting the Marketing of High-Fat, Sugary and Salty Food and Beverage Products to Children' (2016) 94 *Bulletin of the World Health Organization* 540.

37 See Kraak et al, 'Progress Achieved', above n 36, 543; 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.

Australia, and Canada,³⁸ as well as international and regional versions such as the EU Pledge.³⁹ Some countries have introduced legislative restrictions on food marketing to children, as in Chile,⁴⁰ Ireland,⁴¹ and South Korea,⁴² while the UK takes a co-regulatory approach under its broadcasting regulation framework.⁴³ In other words, government action on the issue remains patchy.⁴⁴ In 2016, the WHO's Global Commission on Ending Childhood Obesity noted the failure of member states to fully implement the WHO's recommendations on food marketing to children, and called for member states to introduce measures to reduce children's exposure to unhealthy food marketing, as well as for greater cooperation between states to reduce the impact of cross-border marketing of unhealthy foods and beverages.⁴⁵

IV UNHEALTHY FOOD MARKETING TO CHILDREN AND THE UNCRC

Advocates have encouraged action by governments on unhealthy food marketing to children by framing it as an infringement of rights contained in the UNCRC.⁴⁶ This forms part of a broader concern about the food industry's impact

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- 38 See 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.
- 39 EU Pledge, *Enhanced 2012 Commitments* <<http://www.eu-pledge.eu/content/enhanced-2012-commitments>>.
- 40 See World Cancer Research Fund International, *Nourishing Framework* (18 October 2017) <<http://www.wcrf.org/int/policy/nourishing-framework>>; C Corvalán et al, 'Structural Responses to the Obesity and Non-Communicable Diseases Epidemic: The Chilean Law of Food Labeling and Advertising' (2013) 14 *Obesity Reviews* 79.
- 41 Broadcasting Authority of Ireland, *BAI Children's Commercial Communications Code* (2013) cls 11.4–11.7, 11.10, 13 <<http://www.bai.ie/en/codes-standards/>>; Broadcasting Authority of Ireland, *BAI General Commercial Communications Code* (2017) cl 16.1 <<http://www.bai.ie/en/codes-standards/>>.
- 42 See *Special Act on the Safety Control of Children's Dietary Life* (Republic of Korea), Ministry of Food and Drug Safety; Soyoung Kim et al, 'Restriction of Television Food Advertising in South Korea: Impact on Advertising of Food Companies' (2013) 28 *Health Promotion International* 17.
- 43 Committee of Advertising Practice, *The BCAP Code: The UK Code of Broadcast Advertising* (2010) 60–3, 121–2.
- 44 Kraak et al, 'Progress Achieved', above n 36, 542.
- 45 World Health Organization, 'Report of the Commission on Ending Childhood Obesity' (2016) 19 <http://apps.who.int/iris/bitstream/10665/204176/1/9789241510066_eng.pdf>.
- 46 See Boyd Swinburn et al, 'The "Sydney Principles" for Reducing the Commercial Promotion of Foods and Beverages to Children' (2008) 11 *Public Health Nutrition* 881; Richard Ingleby, Lauren Prosser and Elizabeth Waters, 'UNCROC and the Prevention of Childhood Obesity: The Right Not to Have Food Advertisements on Television' (2008) 16 *Journal of Law and Medicine* 49; Elizabeth Handsley et al, 'A Children's Rights Perspective on Food Advertising to Children' (2014) 22 *International Journal of Children's Rights* 93; Louise Thornley, Louise Signal and George Thomson, 'Does Industry Regulation of Food Advertising Protect Child Rights?' (2010) 20 *Critical Public Health* 25; Katharina Eva Ó Cathaoir, 'Child Rights as a Basis for the Regulation of Food Marketing: The Role of the UN Convention on the Rights of the Child', in Ton Liefwaard and Julia Sloth-Nielsen (eds), *The United Nations Convention on the Rights of the Child: Taking Stock After 25 Years and Looking Ahead* (Brill Nijhoff, 2016) 564.

on human rights, including those related to food, health, and nutrition.⁴⁷ The UN's Special Rapporteur on the Right to Food, Hilal Elver, states that the rise of industrial food production combined with trade liberalisation has allowed large corporations to flood the global market with cheap, nutrient-poor foods that force poor people to choose between their economic interests and nutrition, effectively violating their right to adequate food.⁴⁸ However, the UNCRC can be used only to call for *state* rather than business action on food marketing to children,⁴⁹ as it is an international human rights treaty that places obligations only on signatory states. This article discusses the steps *the food industry* should take to protect children from exposure to marketing for unhealthy products, based on the Guiding Principles and the *Children's Rights and Business Principles*, which use the rights contained in the UNCRC (and other international human rights treaties) to create human rights obligations for businesses. The idea of *businesses* (rather than states) addressing unhealthy food marketing to children from a child rights perspective is an issue that has not been considered in any depth by existing literature on food marketing to children.

The UNCRC opened for signature on 20 November 1989, and entered into force on 2 September 1990.⁵⁰ The Convention formally recognises children as rights bearers and imposes obligations on states to secure the civil, political, economic, social and cultural rights of people under 18 years of age. It recognises that the degree to which children can exercise their rights independently is influenced by their evolving maturity, and emphasises the rights and responsibilities of parents, including in assisting children in the exercise of their rights. The Committee on the Rights of the Child ('CRC') receives and comments on country reports regarding implementation, and issues general comments on the interpretation of the provisions of the UNCRC. These include *General Comment No 15 (2013) on the Right of the Child to the Enjoyment of the Highest Attainable Standard of Health (art 24)* ('General Comment No 15')⁵¹ and the *General Comment No 16 (2013) on State Obligations Regarding the Impact of the Business Sector on Children's Rights* ('General Comment No 16').⁵²

The concept of the best interests of the child is one of four fundamental principles underpinning the Convention, and article 3(1) requires that these be a primary consideration in all actions concerning children, including in legislative and regulatory action by states. Being a 'primary consideration' (rather than the paramount consideration), the best interests of the child may need to be balanced

47 See, eg, Brady, above n 18; Smita Narula, 'Reclaiming the Right to Food as a Normative Response to the Global Food Crisis' (2010) 13 *Yale Human Rights and Development Journal* 403; Jean Ziegler, Special Rapporteur, *Report of the Commission on Human Rights on the Right to Food*, 58th sess, Agenda Item 119(b), UN Doc A/58/330 (28 August 2003) 11–17.

48 'UN Expert Calls Junk Food a Human Rights Concern', *CBS News* (online), 26 October 2016 <<http://www.cbsnews.com/news/junk-food-is-a-human-rights-concern-un-expert/>>.

49 Swinburn et al, 'The "Sydney Principles" for Reducing the Commercial Promotion of Foods and Beverages to Children', above n 46, 883–4; Handsley et al, above n 46; Thornley, Signal and Thompson, above n 46, 31.

50 *United Nations Convention on the Rights of the Child*, above n 11.

51 *General Comment No 15*, UN Doc CRC/C/GC/15 (17 April 2013).

52 *General Comment No 16*, UN Doc CRC/C/GC/16 (17 April 2013).

against those of other groups in instances of conflict.⁵³ However, children's interests must have high priority in state action, and should not be seen simply as one of several considerations.⁵⁴ In relation to food advertising regulation, the best interests of children may need to be weighed against the economic interests of the food, advertising and broadcasting industries, as well as the interests of the adult audience.⁵⁵ However, article 3(1) would suggest that children's interest in being protected from exposure to healthy food marketing may potentially override the interests of advertisers and broadcasters in some circumstances.

Under article 3, states should 'ensure that the interests of the child have been assessed and taken as a primary consideration in decisions and actions taken by the private sector'.⁵⁶ This obligation suggests that states should take steps to ensure that self-regulation of food marketing to children reflects the goal of reducing children's exposure to unhealthy food marketing, given that such marketing infringes children's rights to life, health, and freedom from economic exploitation (as argued below). It also raises the question whether it is sufficient to rely on food industry self-regulation in lieu of statutory regulation of food marketing to children, given the evidence that food industry measures have had little impact on children's exposure to unhealthy food marketing (discussed further below).

Article 6 of the UNCRC recognises children's right to life, and the obligation of state parties to ensure the survival and development of children to the greatest possible extent. The concept of 'development' is holistic, encompassing children's physical, mental, spiritual, moral, psychological and social development.⁵⁷ In its *General Comment on Business and Children's Rights*, the CRC gives examples of business activities that have an impact on the realisation of article 6, and refers specifically to the marketing to children of foods and drinks high in saturated fats, trans-fatty acids, sugar, salt or additives as having a long-term impact on children's health.⁵⁸ Further, the Committee says that measures for implementing article 6 with regard to the business sector will need to include 'preventive measures such as effective regulation and monitoring of advertising and marketing industries'.⁵⁹ Accordingly, the CRC's Comment again reinforces the obligation of governments to regulate the food and advertising industries effectively in order to reduce children's exposure to unhealthy food marketing.

Article 17 also relates to regulation of the advertising and media industries, granting children the right to access information and material from a diversity of

53 Committee on the Rights of the Child, *General Comment No 14 (2013) on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration* UN Doc CRC/C/GC/14 (17 April 2013) 10 ('*General Comment No 14*').

54 Ibid.

55 Handsley et al, above n 46, 128. See also Ingleby, Prosser and Waters, above n 46, 55.

56 *General Comment No 14*, above n 53, 5.

57 Committee on the Rights of the Child, *General Comment No 5 (2003): General Measures of Implementation of the Convention on the Rights of the Child (arts 4, 42 and 44, para 6)*, UN Doc CRC/C/GC/2003/5 (27 November 2003) 4.

58 *General Comment No 16*, UN Doc CRC/C/GC/16, 6–7.

59 Ibid 7.

sources. Among other things, article 17(a) obliges states to encourage the mass media, including private media, to disseminate information and materials of social and cultural benefit to children. States also have an obligation, under article 17(e), to ‘encourage the development of appropriate guidelines for protecting children from information and material injurious to their well-being’ which (according to the CRC) implies regulating the media appropriately to protect children from harmful information.⁶⁰ In other words, article 17 seeks both to empower children by ensuring access to information, and to protect them from certain information. These two approaches may appear to be in tension with each other, but the better view is that they need to proceed in balance with each other, and the UNCRC provides some tools for striking that balance.⁶¹

First, the use of the term ‘injurious’ in relation to the material to be regulated introduces an expectation of rigour in establishing just what material meets that description. Given the evidence of a link between marketing and consumption of unhealthy food products, and the implication of that consumption in obesity, which poses a significant threat to children’s health, there is a clear case for considering that marketing to be ‘injurious’.⁶² This is all the more so if regulation seeks to address the more manipulative and exploitative forms of marketing.

Second, article 17(e) requires states to take into account the provisions of articles 13 and 18 in connection with the protection of children from injurious information. Under article 13(1), children have the right to freedom of expression, which includes the freedom to seek, receive and impart information and ideas of all kinds. Article 13 is conceptualised as a ‘participatory’ right concerned with enhancing children’s autonomy, and granting children the right to participate in the exchange of information.⁶³ From this perspective, it could be considered paternalistic to restrict children’s access to commercial communications about unhealthy food products. However, as discussed above, an established body of evidence shows that food marketing to children exploits younger children’s lack of cognitive ability to critically engage with advertising, justifying restrictions at least in respect of children aged approximately 12 years or less.⁶⁴ It is also worth noting that under the terms of article 13 itself the

60 Ibid 8; see also the New Zealand *Children and Young People’s Advertising Code*, which makes explicit reference to article 17(e) (and article 3) of the Convention: Advertising Standards Authority, *Children and Young People’s Advertising Code* <<http://www.asa.co.nz/codes/codes/new-children-young-peoples-advertising-code/>>.

61 The UNCRC as a whole can be seen to embody a balance between protecting children (paternalism) and respecting their autonomy and right to self-determination: see Claire Breen, *Age Discrimination and Children’s Rights: Ensuring Equality and Acknowledging Difference* (Martinus Nijhoff, 2006) 8.

62 Ingleby, Prosser and Waters, above n 46, 50.

63 Michael Freeman, ‘Children’s Rights as Human Rights: Reading the UNCRC’ in Jens Qvortrup, William A Corsaro and Michael-Sebastian Honig (eds), *The Palgrave Handbook of Childhood Studies* (Palgrave MacMillan, 2009) 377, 379–80; see also M D A Freeman, *The Rights and Wrongs of Children* (Frances Pinter, 1983) 40–60.

64 Claire Breen states that there is a general consensus on the need to protect younger children from themselves and others (due to their limited cognitive capacity), which is reflected in international and domestic law. As a result, discussion regarding younger children’s right to self-determination may not be as pertinent as it is in relation to older children and adolescents. Breen also argues that restrictions on children’s rights should be based on children’s capacity rather than on age alone, which may be

exercise of the rights it provides may be subject to restrictions on public health grounds,⁶⁵ and restrictions on unhealthy food marketing can be legitimately framed as necessary for the protection of children's health and development, as indicated by the general comments of the CRC.⁶⁶

Article 18(1) of the UNCRC recognises that parents (or legal guardians) have primary responsibility for children's upbringing and development, and that the exercise of parental rights and responsibilities is guided by the best interests of the child. The food industry argues that restrictions on unhealthy food marketing to children should (and do) apply during times when children are likely to be watching television alone (ie, during programming designed for children), but do not need to apply when parents are co-viewing television with children (ie, during general audience programs) and can guide children's viewing habits.⁶⁷ This type of approach could suggest that children's exposure to unhealthy food marketing is largely a matter of parental responsibility, rather than one of state (or industry) responsibility. However, the UNCRC challenges the concept of a dichotomy between parents' and states' responsibility for children. Rather, it promotes the idea of *states supporting parents* in respect of their responsibilities towards their children.⁶⁸ For example, article 18(2) requires states to 'render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities'. Accordingly, regulation of unhealthy food marketing to children can be framed as states assisting parents in guiding children towards healthy dietary habits.

Another powerful argument for restrictions on food marketing may be found in article 24 of the UNCRC, which grants children the right to the highest attainable standard of health. Among other things, article 24(2) requires states to take appropriate measures to reduce child and infant mortality and to combat disease and malnutrition, including through the provision of adequate, nutritious food.

discriminatory. From this perspective, it is arguable that restricting advertising to older children and/or adolescents may not be justifiable if it can be shown that young people of this age have the capacity to understand and engage critically with advertising. See Breen, above n 61, 27–33. See also the dissenting judgment of McIntyre and Beetz JJ in *A-G (Quebec) v Irwin Toy Ltd* [1989] 1 SCR 927, 1005–9.

65 *United Nations Convention on the Rights of the Child*, above n 11, art 13(2)(b).

66 Similarly, see *A-G (Quebec) v Irwin Toy Ltd* [1989] 1 SCR 927, where Irwin Toy challenged the constitutionality of Quebec's ban on advertising to children (found in ss 248 and 269 of Quebec's *Consumer Protection Act 1980*) on the basis that it was an unjustifiable restriction on its freedom of expression. However, a majority of Canada's Supreme Court upheld the ban, holding that while it infringed the right to freedom of expression contained in section 2(b) of the *Canada Act 1982* (UK) c 11, sch B pt 1 ('*Canadian Charter of Rights and Freedoms*') and section 3 of Quebec's *Charter of Human Rights and Freedoms* CQLR c C-12, the ban sought to achieve a legitimate government purpose, was a proportionate means of achieving the goal of protecting children from the persuasive intent of advertising, and was justified under section 1 of the *Canadian Charter of Rights and Freedoms* and section 9.1 of the *Quebec Charter of Human Rights and Freedoms*.

67 Australian Food and Grocery Council, 'Food and Beverage Advertising to Children: Activity Report' (May 2012) 5 <<http://www.afgc.org.au/industry-codes/advertising-to-children/rcmi/rcmi-reports-2009.html>>. See also Sarah Wiedersehn, 'Children Still Fed Junk Food Ads on TV', *The Australian* (online) 15 February 2017 <<http://www.theaustralian.com.au/news/latest-news/children-fed-junk-food-ads-on-tv/news-story/e162b35ab3f4cd120b024fa2bdba74ff>>.

68 Handsley et al, above n 46, 122–3.

The CRC has commented that children's right to health requires states to address the fundamental determinants of health, and that full realisation of this right will require the achievement of many other rights recognised in the UNCRC.⁶⁹ The CRC envisages that states will take steps to prevent childhood obesity and associated non-communicable diseases, including through the regulation of marketing for unhealthy foods and beverages.⁷⁰ This recommendation reflects the significant body of research demonstrating that unhealthy food marketing influences children's diet-related health (as described above) and that restrictions on food advertising to children are a particularly cost-effective obesity prevention measure.⁷¹ Accordingly, restrictions on food marketing assist states in realising children's right to health, as well as fulfilling other obligations that support the right to health, including children's right to life and development.

One final article that may require restrictions on food marketing to children is article 32, which recognises the right of children to be protected from economic exploitation. While article 32 makes specific reference to child labour, Handsley and colleagues argue that the article need not be read as applying only to the exploitation of children in the workforce.⁷² If economic activity involves both the production and consumption of goods and services, they argue, children can be economically exploited when acting as consumers, as well as when acting as workers.⁷³ This idea has yet to be tested in a broader forum but it is clearly arguable that, as advertising is central to the process of socialising children as consumers, it could be considered exploitative to target children in food marketing, particularly considering children's developmental vulnerability to marketing, and the potential long-term impact of unhealthy food marketing on children's health.⁷⁴

In summary, the CRC has expressly recognised that the UNCRC obliges states to take action to protect children from exposure to unhealthy food marketing. Effective regulation of such marketing contributes to ensuring children's development and fulfilling their right to health, and to protecting children from material that may be injurious to their health and wellbeing. Restrictions on food marketing support parents in guiding their children towards healthier food choices, thereby supporting the fulfilment of parents' responsibilities towards their children. Regulation of unhealthy food marketing may also be required on the basis that it prevents the exploitation of (younger) children's particular vulnerability to advertising. This does not necessarily imply statutory regulation of unhealthy food marketing, as recognised by article 17(e). However, where states rely on industry self-regulation to control unhealthy food

69 *General Comment No 15*, UN Doc CRC/C/GC/15, 4, 12.

70 *Ibid* 14.

71 See, eg, A Magnus et al, 'The Cost-Effectiveness of Removing Television Advertising of High-Fat and/or High-Sugar Food and Beverages to Australian Children' (2009) 33 *International Journal of Obesity* 1094.

72 Handsley et al, above n 46, 130–3.

73 *Ibid* 131.

74 *Ibid* 131–3.

marketing to children, they must ensure that such initiatives have childhood obesity prevention as a central objective, and are effective in achieving that objective. At the very least, states should be monitoring the efficacy of industry measures on food marketing to children, and intervening if such measures prove unsuccessful in reducing children's exposure to this form of marketing.

V THE GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS

The *Guiding Principles on Business and Human Rights* provide a framework for translating the concepts informing state obligations under the UNCRC into concrete measures businesses can and should take to protect children from exposure to unhealthy food marketing. The Guiding Principles follow on from a series of other international instruments that aim to hold businesses directly accountable for their impact on human rights. These include the International Labour Organization ('ILO') *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy*,⁷⁵ the Organization for Economic Co-operation and Development ('OECD') *Guidelines for Multinational Enterprises*⁷⁶ and *Principles on Corporate Governance*,⁷⁷ and UN initiatives such as the Global Compact.⁷⁸ The Guiding Principles were composed by John Ruggie, the then UN Special Rapporteur on Business and Human Rights, and have the objective of 'enhancing standards and practices with regard to business and human rights so as to achieve tangible results for affected individuals and communities, and thereby also contributing to a socially sustainable globalization'.⁷⁹ The Guiding Principles are based on the three complementary pillars contained in the 'Protect, Respect and Remedy' Framework that Ruggie developed originally. These three principles are:

1. The state duty to protect human rights against abuses by third parties, including business, through appropriate policies, regulation, and adjudication;
2. The corporate responsibility to respect human rights, which in essence means to act with due diligence to avoid infringing the rights of others; and

75 International Labour Organization, *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy* (2017) <http://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/--multi/documents/publication/wcms_094386.pdf>.

76 Organization for Economic Cooperation and Development, *Guidelines for Multinational Enterprises* (OECD, 2008) <<http://www.oecd.org/corporate/mne/1922428.pdf>>.

77 Organization for Economic Cooperation and Development, *Principles for Corporate Governance* (OECD, 2004) <<https://www.oecd.org/corporate/ca/corporategovernanceprinciples/31557724.pdf>>.

78 *United Nations Global Compact* <<https://www.unglobalcompact.org/>>.

79 Guiding Principles, above n 12, 1.

3. Enhanced access to remedies for victims, both judicial and non-judicial.⁸⁰

The corporate responsibility to respect human rights means that businesses must avoid causing or contributing to adverse human rights impacts through their own activities; address such impacts as they occur; and seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships (even if they have not contributed to those impacts directly). Businesses should respect the human rights set out in the International Bill of Human Rights (comprising the *Universal Declaration of Human Rights*⁸¹ and the instruments through which it has been codified, ie, the *International Covenant on Civil and Political Rights*⁸² and the *International Covenant on Economic, Social and Cultural Rights*⁸³), as well as those contained in other human rights standards where relevant, including the UNCRRC.⁸⁴

The Guiding Principles set out a framework for integrating respect for human rights into corporate policies and processes, which includes a policy commitment to meet businesses' responsibility to respect human rights, human rights due diligence processes, and processes that enable the remediation of any adverse human rights impacts businesses cause or to which they contribute.⁸⁵ Due diligence processes are central to integrating respect for human rights into business practices, and the Guiding Principles provide specific guidance on how due diligence should be conducted, including: identifying and assessing actual or potential adverse human rights impacts; modifying internal functions and processes to cease or prevent identified impact; monitoring the effectiveness of their response and communicating to external stakeholders how adverse human rights impacts have been addressed; and cooperating with remediation processes where these processes identify that businesses have caused or contributed to human rights breaches.⁸⁶

The Guiding Principles are supported by policies and institutional infrastructure to assist companies in their implementation. The UN Human Rights Council established the UN Working Group on Business and Human Rights,⁸⁷ and granted it a mandate to promote dissemination and implementation of the Guiding Principles, provide recommendations on the implementation of the guidelines, and support capacity-building efforts.⁸⁸ The Working Group also

80 See John Ruggie, *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises: Protect, Respect, Remedy: A Framework for Business and Human Rights*, UN Doc A/HRC/8/5 (7 April 2008).

81 GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948).

82 Opened for signature 19 December 1996, 999 UNTS 171 (entered into force 23 March 1976).

83 Opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).

84 Guiding Principles, above n 12, 14.

85 Ibid 15–16.

86 Ibid 17–25.

87 *Human Rights and Transnational Corporations and Other Business Enterprises*, HRC Res 17/4, UN GAOR, 17th sess, 33rd mtg, Agenda Item 3, UN Doc A/HRC/RES/17/4 (6 July 2011, adopted 16 June 2011).

88 Ibid; see also Business & Human Rights Resource Centre, *About the Working Group* <<https://business-humanrights.org/working-group/about-the-working-group>>.

accepts urgent appeals and allegations of human rights abuses.⁸⁹ It reports annually to the Human Rights Council and the General Assembly, and has issued a range of reports, interpretive tools, and statements, including from country visits that the Working Group conducts. In addition to these documents, Ruggie has issued an interpretive guide on the corporate responsibility to protect human rights,⁹⁰ and in February 2015, Shift and Mazars launched the UN Guiding Principles Reporting Framework, which comprises 31 questions that enable companies to report on their human rights performance.⁹¹ Nestlé and Unilever are two of the companies that have adopted the Framework and produced human rights reports.⁹²

The Guiding Principles have received a mixed reception. They have influenced other international soft law instruments on business and human rights, with the concept of human rights due diligence being adopted in the OECD *Guidelines for Multinational Enterprises*, the International Organisation for Standardisation ('ISO') *International Standard, ISO 26000: 2010, Guidance on Social Responsibility*, and EU policy documents on corporate social responsibility.⁹³ A large number of businesses have adopted or endorsed the Guiding Principles,⁹⁴ and individual governments have also used them as a basis for national strategies on business and human rights.⁹⁵ Although the Guiding Principles have the support of businesses, international organisations,

89 Business & Human Rights Resource Centre, *Making Submissions* <<https://business-humanrights.org/en/working-group/submissions-interventions-to-un-working-group/making-submissions>>; Office of the High Commissioner for Human Rights, *Methods of Work* <<http://www.ohchr.org/EN/Issues/Business/Pages/WorkingMethods.aspx>>.

90 Office of the High Commissioner for Human Rights, *The Corporate Responsibility to Protect Human Rights: An Interpretive Guide* (UN, 2012) <<http://www.ohchr.org/Documents/Issues/Business/RtRInterpretativeGuide.pdf>>.

91 UN Guiding Principles Reporting Framework, *First Comprehensive Guidance for Companies on Human Rights Reporting Launches in London* (24 February 2015) <<http://www.ungpreporting.org/first-comprehensive-guidance-for-companies-on-human-rights-reporting-launches-in-london/>>; UN Guiding Principles Reporting Framework, *What is the Relationship between the UNGP Reporting Framework and Integrated Reporting?* (2017) <<http://www.ungpreporting.org/reporting-framework/>>. Shift is a non-government organisation established to assist businesses with implementing the Guiding Principles and Mazars is an international accountancy firm: Shift, *Our Story* <<http://www.shiftproject.org/who-we-are/>>; Mazars, *Mazars at a Glance* <<http://www.mazars.co.uk/Home/About-us/Mazars-at-a-glance>>.

92 UN Guiding Principles Reporting Framework, *Users and Supporters* <<http://www.ungpreporting.org/about-us/support-and-users/#Companies>>. See Unilever, 'Enhancing Livelihoods, Advancing Human Rights: Human Rights Report 2015' (2015) <https://www.unilever.com/Images/unilever-human-rights-report-2015_tcm244-437226_en.pdf>; Nestlé, 'Nestlé in Society – Creating Shared Value and Meeting our Commitments 2015' (Report, 2015) <http://www.nestle.com/asset-library/documents/library/documents/corporate_social_responsibility/nestle-csv-full-report-2015-en.pdf>.

93 See Peter Muchlinski, 'Operationalising the UN Business and Human Rights Framework: The Corporate Responsibility to Respect Human Rights and Due Diligence' in Sarianna Lundan (ed), *Transnational Corporations and Transnational Governance: The Cost of Crossing Borders in the Global Economy* (Palgrave Macmillan, 2015) 325, 343.

94 See Simons, above n 24, 10.

95 James Harrison, 'Establishing a Meaningful Human Rights Due Diligence Process for Corporations: Learning from Experience of Human Rights Impact Assessment' (2013) 31 *Impact Assessment and Project Appraisal* 107.

governments, and academics,⁹⁶ critics argue that their effectiveness is limited by the fact they are non-binding and vague, they fail to place positive obligations on businesses, and they lack concrete measures for their implementation, monitoring and enforcement.⁹⁷ Despite the large number of companies agreeing to implement the Guiding Principles, there is only limited evidence that these have transformed the behaviour of multinational businesses,⁹⁸ and they seem unlikely to do so in the absence of binding commitments and effective oversight.⁹⁹

VI THE CHILDREN'S RIGHTS AND BUSINESS PRINCIPLES

The *Children's Rights and Business Principles* contain further guidance on how the UNCRC might be translated into a series of responsibilities for businesses in relation to food marketing to children. The United Nations International Children's Emergency Fund ('UNICEF'), Save the Children and the Global Compact produced the *Children's Rights and Business Principles* in 2012, to elaborate and expand upon the role of business in relation to children's rights – an area that had not been addressed within the business and human rights agenda previously.¹⁰⁰ Drawing on the UNCRC, the Principles claim to 'provide a comprehensive framework for understanding and addressing the impact of business on the rights and well-being of children'.¹⁰¹ The Principles recommend actions that businesses can take to *respect* and *support* children's rights, with the former defined as avoiding and addressing human rights infringements, and the latter requiring positive, voluntary actions to advance children's rights, including through core business activities and measures such as strategic social investments, philanthropy, advocacy and public policy engagement.¹⁰² The Principles are accompanied by a 'good practices' guide developed by the Global Compact, which gives examples of how companies are fulfilling their obligations under the Principles.¹⁰³

The Principles are 10 principles that relate to matters such as the elimination of child labour, 'providing decent work for young workers, parents and

96 See, eg, Julia Ruth-Maria Wetzel, *Human Rights in Transnational Businesses: Translating Human Rights Obligations into Compliance Procedures* (Springer Publishing, 2016) 193–200.

97 See, eg, Simons, above n 24, 9; Steven Bittle and Laureen Snider, 'Examining the Ruggie Report: Can Voluntary Guidelines Tame Global Capitalism?' (2013) 21 *Critical Criminology* 177; David Bilchitz, 'A Chasm Between "Is" and "Ought"? A Critique of the Normative Foundations of the SRS's Framework and the Guiding Principles' in Surya Deva and David Bilchitz (eds), *Human Rights Obligations of Business: Beyond Corporate Responsibility to Protect?* (Cambridge University Press, 2013) 107.

98 See Bittle and Snider, above n 97.

99 Simons, above n 24, 38.

100 Children's Rights and Business Principles, *Homepage: Overview* <<http://childrenandbusiness.org/about-the-principles/>>; Tara M Collins, 'The Relationship between Children's Rights and Business' (2014) 18 *International Journal of Human Rights* 582, 587.

101 *Children's Rights and Business Principles*, above n 13, 3.

102 *Ibid* 5.

103 United Nations Global Compact, *Children's Rights and Business Principles – Good Practices per Principle* (August 2015) <http://childrenandbusiness.org/wp-content/uploads/2013/02/Business-Practice_August-2015.pdf>.

caregivers', ensuring the protection and safety of children in all business activities and facilities, and protecting children affected by emergencies.¹⁰⁴ Of particular interest to food marketing to children are the following Principles:

1. All businesses should meet their responsibility to respect children's rights and commit to supporting the human rights of children; and
6. All businesses should use marketing and advertising that respect and support children's rights.

Principle 1 obliges businesses to recognise the core principles underpinning children's rights, including the best interests of the child, and child survival and development. Businesses must also meet the responsibility to respect children's rights (including in their own activities and in those of their business partners), by putting in place 'appropriate policies and processes', reflecting those set out in the Guiding Principles.¹⁰⁵ These include a policy statement that sets out the business responsibility to respect children's rights and other human rights. This policy statement should stipulate the business's expectations of personnel, business partners and others directly linked to the organisation, be endorsed by the most senior level of business, be made publicly available, communicated externally and internally, and be 'embedded in relevant policies and procedures'.¹⁰⁶ Businesses must also adopt human rights due diligence processes, ie, processes of identifying, assessing and mitigating or eliminating any potential or adverse impact on children's rights. Finally, businesses should make available child-sensitive processes to enable remediation of adverse impacts on children's rights, and make a commitment to support the rights of children.¹⁰⁷ Opportunities to support children's rights can be identified through human rights due diligence processes, 'including through consultation with children and their families, as well as with appropriate experts in children's rights'.¹⁰⁸

In the context of Principle 6, the corporate responsibility to respect means 'ensuring that communications and marketing do not have an adverse impact on children's rights', including by ensuring that product packaging and labelling are clear, accurate and complete, and empower children and parents to make informed decisions.¹⁰⁹ In assessing whether marketing has an adverse impact on children's rights, businesses should consider children's greater susceptibility to manipulation, among other things. The corporate commitment to support children's rights includes the use of marketing that 'raises awareness of and promotes children's rights, positive self-esteem, healthy lifestyles and non-violent values'.¹¹⁰ Principle 6 also requires companies to comply with 'the standards of business conduct in World Health Assembly instruments related to marketing and health'. Here the Principles expressly cite the WHO

104 *Children's Rights and Business Principles*, above n 13, 11.

105 *Ibid* 14.

106 *Ibid*.

107 *Ibid* 16.

108 *Ibid*.

109 *Ibid* 26.

110 *Ibid*.

*Recommendations on the Marketing of Foods and Non-alcoholic Beverages to Children.*¹¹¹

VII THE WHO RECOMMENDATIONS ON THE MARKETING OF FOODS AND NON-ALCOHOLIC BEVERAGES TO CHILDREN

This WHO policy document contains 12 recommendations relating to the objectives of restrictions on food marketing, policy development, implementation, monitoring and evaluation, and research.¹¹² It is accompanied by a framework that assists national policy makers in implementing the recommendations in their jurisdiction.¹¹³ The recommendations single out marketing for ‘foods high in saturated fats, trans-fatty acids, free sugars, or salt’ and the first two recommendations, on the objectives of food marketing regulation, are framed in terms of reducing the impact of this marketing on children, the exposure of children to such marketing, and the persuasive power of unhealthy food marketing.¹¹⁴ Most of the remaining recommendations refer to processes for developing and implementing policy, rather than specific measures to achieve these ends. The only recommendation for a particular substantive measure is Recommendation 5:

Settings where children gather should be free from all forms of marketing of foods high in saturated fats, *trans*-fatty acids, free sugars, or salt. Such settings include, but are not limited to, nurseries, schools, school grounds and pre-school centres, playgrounds, family and child clinics and paediatric services and during any sporting and cultural activities that are held on these premises.¹¹⁵

It is clearly intended that marketing in other contexts be addressed, but the specifics of that are left to member states to identify in the course of following the recommended process.

The Recommendations do not advise states to implement controls on food marketing through any particular regulatory, legislative or policy measure, but encourage states to consider different options, including self-regulation and statutory regulation.¹¹⁶ The WHO recommends further that ‘[t]he policy

111 Ibid 26. The Principles also refer to the following World Health Organization instruments: *WHO Framework Convention on Tobacco Control*, opened for signature 31 May 2003, 2302 UNTS 166 (entered into force 27 February 2005); *Global Strategy to Reduce the Harmful Use of Alcohol*, WHA 63.13, WHA Res, 63rd sess, WHA63/2010/REC/1 <http://www.who.int/substance_abuse/activities/gsrhua/en/index.html>; *International Code of Marketing of Breast-Milk Substitutes*, WHA 34.22, WHA Res, 15th sess, WHA34/1981/REC/1 <http://www.who.int/nutrition/publications/code_english.pdf>.

112 See World Health Organization, *Set of Recommendations on the Marketing of Foods and Non-alcoholic Beverages to Children*, above n 35.

113 World Health Organization, *A Framework for Implementing the Set of Recommendations on the Marketing of Foods and Non-alcoholic Beverages to Children* (2012) <http://apps.who.int/iris/bitstream/10665/80148/1/9789241503242_eng.pdf>.

114 World Health Organization, *Set of Recommendations on the Marketing of Foods and Non-alcoholic Beverages to Children*, above n 35, 8.

115 Ibid 9 (emphasis in original).

116 Ibid 11 (Recommendation 10); see also at 8.

framework should specify enforcement mechanisms and establish systems for their implementation. In this respect, the framework should include clear definitions of sanctions and could include a system for reporting complaints'.¹¹⁷ Recommendation 10 suggests the inclusion of a monitoring mechanism to ensure compliance with the objectives set out in national policy, using clearly defined indicators. The implementation framework elaborates that monitoring processes should be transparent and independent of any party with a conflict of interest.¹¹⁸

The Recommendations appear to put responsibility for food marketing regulation squarely on the shoulders of governments, with industry and other non-government actors playing a secondary role. For example, Recommendation 4 requires governments to set clear definitions for the key components of policy on food marketing to children, and Recommendation 6 states that governments should be 'the key stakeholders in the development of policy and provide leadership, through a multi-stakeholder platform, for implementation, monitoring and evaluation'.¹¹⁹ The Recommendations envisage the possibility of some form of engagement with the private sector when member states are developing policy on food marketing to children, stating that governments may wish to allocate defined roles to non-government stakeholders, 'while protecting the public interest and avoiding conflict of interest'.¹²⁰ The Recommendations do not place any responsibilities directly on the business sector, except for stating that:

Independently of any other measures taken for implementation of a national policy, private sector stakeholders should be encouraged to follow marketing practices that are consistent with the policy aim and objective set out in these recommendations and to practise them globally in order to ensure equal consideration to children everywhere and avoid undermining efforts to restrict marketing in countries that receive food marketing from beyond their borders.¹²¹

In other words, it would be desirable for food companies (and advertisers) to ensure that their marketing practices address the impact of unhealthy food marketing on children, including by reducing children's exposure to food marketing, and the persuasive power of such marketing. Arguably, the *Children's Rights and Business Principles* also require that the food industry take into account the WHO's recommendations for the design of food marketing regulation (eg, the need for independent monitoring) in creating its own self-regulatory initiatives, such as those on marketing to children.

117 Ibid 11.

118 World Health Organization, *A Framework for Implementing the Set of Recommendations on the Marketing of Foods and Non-alcoholic Beverages to Children*, above n 113, 42.

119 World Health Organization, *Set of Recommendations on the Marketing of Foods and Non-alcoholic Beverages to Children*, above n 35, 10.

120 Ibid.

121 Ibid 11.

VIII AN OVERVIEW OF FOOD MARKETING REGULATION IN AUSTRALIA

Having described the international instruments relevant to a child rights approach to food marketing, we now discuss food marketing regulation in Australia, before moving on to business actions on the marketing of unhealthy food to Australian children.

Food advertising in Australia is regulated through a complex mix of statutory regulation, co-regulation and self-regulation. Legislative restrictions on misleading and deceptive advertising can be found in the Australian Consumer Law ('ACL') (contained in schedule 2 of the *Competition and Consumer Act 2010* (Cth)), which is applied in each jurisdiction by state and territory Fair Trading Acts. Food advertising is also subject to regulatory requirements found in the *Australia New Zealand Food Standards Code*, implemented by state-level food Acts. These Acts also contain provisions that prohibit misleading and deceptive food advertising, among other things.¹²² A key avenue for restrictions on television food marketing is the *Broadcasting Services Act 1992* (Cth), which establishes a co-regulatory system for broadcast advertising in Australia, overseen by the Australian Communications and Media Authority ('ACMA'). For the purpose of this article, the relevant instruments are the *Children's Television Standards 2009* ('CTS'), a regulatory instrument promulgated by the ACMA under section 122 of the Act, and the *Commercial Television Industry Code of Practice* ('CTICP'), which is drawn up by industry and registered by the ACMA, again under the Act.¹²³ Non-broadcast advertising is subject only to the ACL and to certain industry self-regulatory codes.^L

The CTS regulate advertising only during certain high-quality children's programming that free-to-air broadcasters must show in fulfilment of a quota. Only one of the rules applies specifically to food advertisements, namely CTS 32(7): '[a]n advertisement for a food product may not contain any misleading or incorrect information about the nutritional value of that product'. Other provisions of significance for food advertising are described in Appendix 1.

As mentioned, the CTICP is an example of 'co-regulation' because it is drawn up by industry but approved and registered by the government regulator (the ACMA). Among other functions, the CTICP establishes a classification regime for program material and commercials,¹²⁴ and places restrictions on when advertisements can be shown, and in what volume.¹²⁵

The section on advertising limits is expressed to operate 'subject to' the CTS.¹²⁶ The Code also states that advertisers are 'expected to ensure that

122 See, eg, *Food Act 2003* (NSW) ss 18, 22.

123 *Broadcasting Services Act 1992* (Cth) s 123.

124 See Free TV Australia, *Commercial Television Industry Code of Practice* (1 December 2015) cl 2 <http://www.freetv.com.au/media/Code_of_Practice/Free_TV_Commercial_Television_Industry_Code_of_Practice_2015.pdf>.

125 *Ibid* cl 5.3.

126 *Ibid* cl 5.

advertisements ... comply with'¹²⁷ certain codes developed by the Australian Association of National Advertisers ('AANA'), including the *AANA Code for Advertising & Marketing Communications to Children* ('CAMCC'),¹²⁸ and the *AANA Food & Beverages Advertising & Marketing Communications Code* ('FBAMCC').¹²⁹ It is perplexing that a code which is binding on television licensees should contain a provision about what *advertisers* are 'expected' to do. The CTICP does not impose binding obligations on licensees regarding the AANA codes.

The AANA codes have broader application than the CTS and CTICP in that they extend to other media beyond television, for example print, online and outdoor advertising. However, they specifically exclude marketing via product labelling or packaging; and the CAMCC applies only to advertisements that are for a product or service of principal appeal to children, *and* appear to be 'directed primarily to' children. Children are defined as persons 14 years and under.¹³⁰

Seven of the 16 provisions of the FBAMCC are similarly limited. Details of the provisions in all these codes (and the food industry initiatives that are discussed below) are provided in the appendix at the end of the article.

These Australian regulations have considerable gaps and shortcomings. For example, the CTS do not apply to the large amounts of general audience programming children watch, but only to programming designed specifically for children. The CTS also contain a number of loopholes, limiting their efficacy even when they do apply. For example, CTS 32(7) prohibits advertisements that contain misleading or incorrect information, but remains silent on the overall impression created by an advertisement, for example by omitting relevant information. The 'pester power' section of the CTS applies only to 'any advertisements *designed to put undue pressure* on children to ask their parents or another person to purchase something'.¹³¹ Not only does the provision leave open the possibility of 'due pressure' on children, the inclusion of a reference to the advertiser's intent (with the word 'designed') makes a breach of that provision very difficult to prove. While the 'premiums' section of the CTS was improved in a 2009 review of the CTS,¹³² the new provision still allows advertisements for

127 Ibid cl 5.7.1.

128 Australian Association of National Advertisers, *Code for Advertising & Marketing Communications to Children* (2016) <http://aana.com.au/content/uploads/2016/08/Advertising_Marketing_Comms_to_Children_Code_081215.pdf>.

129 Australian Association of National Advertisers, *Food & Beverages Advertising & Marketing Communications Code* (2009) <http://aana.com.au/content/uploads/2016/08/Food_Beverages_Code_081215.pdf>.

130 Australian Association of National Advertisers, *Code for Advertising & Marketing Communications to Children*, above n 128, 1.

131 CTS 31 (emphasis added).

132 These revisions made it clear that over-emphasising the premium is a breach; previously it was thought that the overemphasis also had to create a misleading impression as to the nature of the product. For the review of the CTS, see Australian Communication and Media Authority, 'Review of the Children's Television Standards 2005: Report of the Review' (August 2008) <<https://www.acma.gov.au/-/media/Diversity-Localism-and-Accessibility/Report/pdf/Report-of-the-CTS-Review-2008-pdf.pdf?la=en>>; Australian Communication and Media Authority, 'Review of the Children's Television Standards 2005: Final Report of the Review', above n 30, 7.

meal-plus-toy packages (such as those marketed by popular fast food brands) to focus solely on the toy, because it is not considered a premium.

The substantive terms of the AANA's codes also contain significant weaknesses. For example, as noted above, the CAMCC applies only to communications that are about a product or service of principal appeal to children, *and* that appear to be 'directed primarily to' children 14 years and under.¹³³ There are very few advertisements that fall squarely and indisputably in that category; far more are for products of interest both to children and to people 15 and over (for example chocolate, ice cream, potato chips), or that are scripted to be addressed to people 15 and over, but would nevertheless attract the attention of a child. There are numerous examples of advertisements being apparently designed to take advantage of this limited application, for example, a bakery chain's billboard featuring coloured pencils and buns with coloured chocolates on top, along with the words: 'School lunches? Problem solved'.¹³⁴ The Advertising Standards Board ('ASB'), which hears complaints about breaches of the AANA's codes, considered a complaint against that communication, and said that 'some elements of the advertisement would be appealing to children, particularly the images, but ... overall the content is equally likely to be of appeal to parents and carers and is therefore not directed primarily to children'.¹³⁵ This suggests it would be very difficult to make an advertisement that *does* fit the definition of being 'directed primarily to children'.

Provisions based on restrictive definitions of the kind just discussed are clearly not drafted with a view to limiting the amount or type of food advertising to which children are exposed. This is not surprising, considering that most of the advertising children see is also seen by adults. Even on television, the bulk of children's viewing is of programs that are also very popular with adults: it would be impossible to limit children's exposure during those programs, or in public places, without also limiting advertisers' access to the adult audience.

All of the instruments discussed above lack proactive, independent monitoring or enforcement, instead relying on consumer complaints to the relevant broadcaster or regulatory body.

Advocates have called on the Australian government to introduce stronger restrictions on food marketing to children, including statutory bans on unhealthy food marketing on television before 9pm.¹³⁶ However, successive Commonwealth governments have avoided introducing any new regulation on food marketing to children. Between 2005 and 2009 the ACMA reviewed the CTS, and considered the question of whether it should place stronger restrictions on the marketing of

133 The FBAMCC contains a similarly restrictive definition, which limits the application of its second part.

134 Advertising Standards Board, 'Case Report: Bakers Delight' (Case Report Number 0072/17, February 2017).

135 See *Ibid* 5.

136 See, eg, National Preventative Health Taskforce, 'Australia: The Healthiest Country by 2020 – National Preventative Health Strategy – The Roadmap for Action' (Strategy, 2009) 123–5; S MacKay et al, 'A Comprehensive Approach to Protecting Children from Unhealthy Food Advertising and Promotion' (Position Paper, Obesity Policy Coalition, 2011) 31.

food to children.¹³⁷ In concluding the review, the ACMA declined to introduce new restrictions, but called on the food industry to consider how it could address community concern about unhealthy food marketing to children without the need for further regulation.¹³⁸ The food industry responded by introducing two voluntary initiatives in 2009, similar to pledges on food marketing to children found in other jurisdictions.¹³⁹ These are the *Responsible Children's Marketing Initiative* ('RCMI')¹⁴⁰ and the *Quick Service Restaurant Initiative for Responsible Advertising and Marketing to Children* ('QSRI').¹⁴¹

IX AUSTRALIAN FOOD INDUSTRY INITIATIVES ON MARKETING TO CHILDREN

The objectives of the RCMI and QSRI are to:

- Reduce Advertising and Marketing Communications to Children for food and beverage products that do not represent healthier choices;
- Use Advertising and Marketing Communications to Children to help promote healthy dietary choices and healthy lifestyles amongst Australian children; and
- Provide an independent, best practice avenue for consumers to raise concerns about Advertising and Marketing Communications to Children for food and beverage products.¹⁴²

Companies that join the Initiatives agree to a series of principles on food marketing to children, contained in a core code document. The central principle is that signatory companies will advertise only 'healthier dietary choices' (as defined by set nutrition criteria) in marketing directed to children, and such advertising must also contain messaging that encourages good dietary habits and physical activity.¹⁴³ 'Advertising and Marketing Communications to Children' is defined as advertising or marketing that is directed primarily to children based on the theme, visuals and language used in the advertisement itself, or advertising that is placed in a medium that is primarily directed to children based on the medium's creative content, or where children represent 35 per cent or more of the

137 See Australian Communication and Media Authority, 'Review of the Children's Television Standards 2005: Report of the Review', above n 132; Australian Communication and Media Authority, 'Review of the Children's Television Standards 2005: Final Report of the Review', above n 30.

138 See Australian Communication and Media Authority, 'Review of the Children's Television Standards 2005: Final Report of the Review', above n 30, 7.

139 See Hawkes and Harris, above n 38.

140 Australian Food and Grocery Council, *Responsible Children's Marketing Initiative* (2014) <<http://www.afgc.org.au/our-expertise/health-nutrition-and-scientific-affairs/advertising-to-children/>>.

141 Australian Food and Grocery Council, *Quick Service Restaurant Initiative for Responsible Advertising and Marketing to Children* (2014) <<http://www.afgc.org.au/our-expertise/health-nutrition-and-scientific-affairs/advertising-to-children/>>.

142 Australian Food and Grocery Council, *Responsible Children's Marketing Initiative*, above n 140, 2; Australian Food and Grocery Council, *Quick Service Restaurant Initiative*, above n 141, 2.

143 Australian Food and Grocery Council, *Responsible Children's Marketing Initiative*, above n 140, 6; Australian Food and Grocery Council, *Quick Service Restaurant Initiative*, above n 141, 6.

medium's audience.¹⁴⁴ Participants must promote only healthy dietary choices in product placement and interactive games directed to children, and agree to a prohibition on all food marketing in primary schools, preschools and day care centres.¹⁴⁵

Participants write 'Company Action Plans' that outline the specific actions companies will take to implement the core code document and report annually on compliance against this plan. The scheme is administered by the Australian Food and Grocery Council (a trade industry association) via a Code Administration Manager, overseen by a Code Administration Committee.¹⁴⁶ Public complaints can be made to the ASB.

X FOOD INDUSTRY SELF-REGULATORY MEASURES ON MARKETING TO CHILDREN AS CHILD RIGHTS PROTECTION MEASURES

To what extent can food industry self-regulation be conceptualised as a business measure to respect the rights of children as they relate to food marketing? The adoption of self-regulation on responsible food marketing forms part of sophisticated corporate social responsibility ('CSR') programs that have been adopted by large transnational food manufacturers and retailers such as McDonald's, Pepsi Co, and Nestlé. Increasingly, food companies adopt CSR measures related to the nutrition- and diet-related health of their consumers (such as product reformulation or re-sizing) in addition to more traditional commitments on labour rights and environmental protection, for example.¹⁴⁷ The Australian food industry's self-regulation measures were not designed by the industry using a child rights approach expressly. However, the 'good practices' booklet that accompanies the *Children's Rights and Business Principles* lists the commitments of several food companies on food marketing to children as examples of how businesses have responded to Principle 6. For example:

144 Australian Food and Grocery Council, *Responsible Children's Marketing Initiative*, above n 140, 3; Australian Food and Grocery Council, *Quick Service Restaurant Initiative*, above n 141, 3.

145 Unless 'specifically requested by, or agreed with, the school administration for educational or informational purposes, or related to healthy lifestyle activities under the supervision of the school administration or appropriate adults': Australian Food and Grocery Council, *Responsible Children's Marketing Initiative*, above n 140, 6; Australian Food and Grocery Council, *Quick Service Restaurant Initiative*, above n 141, 6. The QSRI also contains additional requirements on the provision of nutritional information on websites and product packaging, and prohibits signatories from giving away food and beverages (or vouchers) to children as prizes at children's sports events unless those products are healthier dietary choices: see Australian Food and Grocery Council, *Quick Service Restaurant Initiative*, above n 141, 6.

146 Australian Food and Grocery Council, *Responsible Children's Marketing Initiative*, above n 140, 4, sch 2; Australian Food and Grocery Council, *Quick Service Restaurant Initiative*, above n 141, 4, sch 2.

147 See, eg, Yach et al, above n 27; Lori Dorfman et al, 'Soda and Tobacco Industry Corporate Social Responsibility Campaigns: How Do They Compare?' (2012) 9 *PLoS Medicine* e1001241; Tara Acharya et al, 'Activities of the Private Sector' in David Stuckler and Karen Siegal (eds), *Sick Societies: Responding to the Global Challenges of Chronic Disease* (Oxford University Press, 2011) 187.

A major international beverage producer made a commitment to advertise to children under 12 only products that meet global science-based nutrition standards and joined a group of global food and beverage manufacturers to adopt a worldwide voluntary commitment to child-friendly advertising.¹⁴⁸

This suggests that self-regulation of food advertising is being framed as a child rights measure, at least after the fact. The *Children's Rights and Business Principles* might suggest the need for action by food companies to protect children from marketing for unhealthy products – as the food industry has done with its voluntary measures. However, we argue that industry self-regulation of food marketing to children does not truly respect children's rights or prioritise the best interests of the children.

Self-regulatory measures have been subject to significant criticism, particularly as they have done little to improve children's food marketing environment.¹⁴⁹ Monitoring reports produced by the Australian Food and Grocery Council find that self-regulation has been effective in reducing the amount of unhealthy food marketing that *directly targets* children, either through the design of the advertisement itself, or via its placement in media directed to children.¹⁵⁰ However, independent research shows that the vast majority of food marketing *viewed by* children is still for unhealthy products, and that self-regulation has done little to change this. One study found that in 2015, Australian children viewed an average of three advertisements for unhealthy food products per hour of prime-time television that they watched, a figure that remained unchanged since 2011, prior to the introduction of the RCMI and QSRI.¹⁵¹ In other words, self-regulation may be effective in reducing marketing that directly targets children, but it is ineffective in addressing children's exposure to unhealthy food marketing that is targeted to an adult or general audience.

This result is unsurprising given that the recent initiatives and pledges aim to shift advertising to children towards 'healthier' foods and beverages,¹⁵² or to reduce advertising for unhealthy products that directly targets children (as with the RCMI and QSRI), rather than to limit children's exposure to unhealthy food marketing. As noted above, the *Children's Rights and Business Principles* require food companies to comply with standards for business conduct set out in

148 United Nations Global Compact, *Children's Rights and Business Principles – Good Practices per Principle*, above n 103, 13.

149 See Lesley King et al, 'Industry Self Regulation of Television Food Advertising: Responsible or Responsive?' (2011) 6 *International Journal of Paediatric Obesity* e390; Lesley King et al, 'Building the Case for Independent Monitoring of Food Advertising on Australian Television' (2013) 16 *Public Health Nutrition* 2249; 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; Wendy L Watson et al, 'Advertising to Children Initiatives Have Not Reduced Unhealthy Food Advertising on Australian Television' (2017) 39 *Journal of Public Health* 787.

150 See Australian Food and Grocery Council, 'Annual Compliance Report: 2015 Annual Compliance Report for the RCMI and QSRI' (2015) 3 <<http://www.afgc.org.au/wp-content/uploads/2015-Annual-Compliance-Report.pdf>>.

151 Watson et al, above n 149, 3.

152 In addition to the RCMI and QSRI, see the US food industry pledge: Council of Better Business Bureaus, 'Children's Food and Beverage Advertising Initiative Program and Core Principles Statement' (4th ed, 2014). See also Parke Wilde, 'Self-Regulation and the Response to Concerns about Food and Beverage Marketing to Children in the United States' (2009) 67 *Nutrition Reviews* 155, 163.

the WHO's recommendations, which aim precisely to limit such exposure (regardless of whether the marketing in question is targeted at children or adults). The focus on exposure rather than target market is justified because children can find appealing, and be influenced by, marketing that is not directly targeted to them.¹⁵³ Yet the food industry focuses on reducing *child-targeted* marketing for unhealthy products, an approach that does not accord with the WHO's recommendations, nor appear to prioritise children's best interests as a central consideration.

Research suggests that the failure of industry self-regulation to reduce children's exposure to food marketing relates to the poor design and implementation of these measures, as well as to their narrow objectives.¹⁵⁴ The limitations of the RCMI and QSRI are summarised at Table 1 below.

The substantive terms and conditions of the self-regulatory initiatives contain significant loopholes, which leave companies with an array of promotional techniques with which to market unhealthy products to children. For example, the RCMI and QSRI do not restrict the use of equity brand characters (characters developed and owned by food companies), premium offers (the offer of a free toy or other product with a food purchase), product packaging and labelling, sponsorship, brand advertising, or promotions via apps.¹⁵⁵ In addition, health advocates raise concerns that compliance with the Initiatives' requirement to include messaging that promotes physical activity gives unhealthy foods and beverages a 'healthy halo' that draws attention away from their poor nutritional quality.¹⁵⁶ In other words, sending healthy messages as part of food marketing might not alleviate the detrimental influence that such marketing can have on children's health, but rather enhance it.

153 See Cairns, Angus and Hastings, above n 10, 32.

154 See, eg, Lana Hebden et al, 'Industry Self-Regulation of Food Marketing to Children: Reading the Fine Print' (2010) 21 *Health Promotion Journal of Australia* 229; Belinda Reeve, 'Private Governance, Public Purpose? Assessing Transparency and Accountability in Self-Regulation of Food Advertising to Children' (2013) 10 *Bioethical Inquiry* 149; Belinda Reeve, 'Self-Regulation of Food Advertising to Children: An Effective Tool for Improving the Food Marketing Environment?' (2016) 42 *Monash University Law Review* 419.

155 Reeve, 'Self-Regulation of Food Advertising to Children', above n 154, 440–3. See also Hebden et al, above n 154, 223; J Lumley, J Martin and N Antonopoulos, 'Exposing the Charade: The Failure to Protect Children from Unhealthy Food Advertising' (Position Paper, Obesity Policy Coalition, 2012) 12–14.

156 Koplan and Brownell, above n 23; Jennifer L Harris, Kelly D Brownell and John A Bargh, 'The Food Marketing Defence Model: Integrating Psychological Research to Protect Youth and Inform Public Policy' (2009) 3 *Social Issues and Policy Review* 221, 226–7.

Table 1: Limitations in the substantive terms and regulatory processes established by the *Responsible Children's Marketing Initiative* and the *Quick Service Restaurant Initiative for Responsible Advertising and Marketing to Children*

	Element of the code	Limitation
Substantive content of the codes	Objectives	Aims to reduce advertising for unhealthy products that directly targets children rather than limiting children's exposure to unhealthy food marketing
	Media channels and promotional techniques covered by the codes	Excludes equity brand characters, premium offers, product packaging and labelling, sponsorship, brand advertising, promotions via apps
	Advertising messaging requirement	Creates a positive requirement to promote healthy lifestyles, drawing attention away from the poor nutritional quality of advertised products
	Food and beverage products that the codes apply to	Applies to a narrow range of foods and beverages, allowing companies to market the majority of their (unhealthy) products to children
	Definition of media 'directed primarily to children'	Contains a narrow definition of media 'directed primarily to children', which does not apply to children's peak television viewing times or to general audience programs that are popular with children
	Definition of advertising content 'directed primarily to children'	This criterion is interpreted narrowly by the ASB, meaning that children are exposed to advertising that they find appealing but which is directed to a general audience
Regulatory processes established by the codes	Code development	No consultation with external stakeholders, eg, government or parent/child advocates
	Administration	Administered through a committee located within a trade industry association and dominated by industry members
	Monitoring	Heavily reliant on company self-reports. The AFGC has undertaken monitoring in the past, but there is no independent, systematic monitoring against process and outcome indicators
	Complaints-handling mechanism	A public complaints-handling mechanism is available, but laying a complaint is complex and time-consuming
	Enforcement	Relies on complaint determinations by the Advertising Standards Board. Removal or modification of offending ads is likely to occur after a campaign has finished

To identify healthier choice products that are suitable for marketing to children, RCMI participants may use either existing government or health organisation nutrition criteria or their own company-developed model. However, company-developed criteria are much more lenient than those developed by

government or non-government organisations, identifying 77 per cent of signatory companies' products as suitable for marketing to children; in comparison, a nutrient profiling tool developed by an Australian government agency identified only 20 per cent of these products as suitable.¹⁵⁷ QSRI participants must use one uniform nutrient-profiling model to identify products that are suitable for marketing to children, but as this applies only to children's meals, it excludes the vast majority of fast-food marketing.¹⁵⁸

Another significant limitation is that the Initiatives apply only to advertising and marketing placed in media that are 'directed primarily to children'. This term is defined to include advertisements shown during television programs and other media designed specifically for children based on the media's creative content, as well as in media where the audience comprises 35 per cent or more children. In other words, the Initiatives exclude advertising shown during television shows (and other media) that are seen by large numbers of children but are not designed specifically for children, and are also watched by large numbers of adults, meaning that children do not comprise a sufficiently large *proportion* of the audience. Other self-regulation, for example the AANA codes, is similarly limited. Food companies remain free to advertise unhealthy products in general audience programs with both large child and adult audiences, such as *My Kitchen Rules*, which is one of the programs most watched by Australian children under the age of 12 years.¹⁵⁹ Accordingly, reliance on the criterion of media being 'directed primarily to children' (or similar) does not accord with the WHO-recommended objective of reducing children's overall exposure to unhealthy food marketing.

The RCMI and QSRI also use a criterion of whether advertisements are directed to children, based on the content of the advertisement itself. In other words, the Initiatives prohibit advertisements that target children based on the design of the advertisement itself, irrespective of the medium that the advertisement is placed in. However, as described above, the ASB takes a narrow view of which advertisements are directed to children, permitting advertisers to use techniques that appeal to children (such as animated characters), so long as the overall design of the advertisement is directed to adult or general audiences.¹⁶⁰ Children's exposure remains unchanged.

As well as loopholes in the substantive content of industry self-regulation, there are flaws in the processes of administration, monitoring, and enforcement

157 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, 263–4; see also C Mills, J Martin and N Antonopoulos, 'End the Charade! The Ongoing Failure to Protect Children from Unhealthy Food Marketing' (Position Paper, Obesity Policy Coalition, 2015) 6.

158 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, 23.

159 See Advertising Standards Bureau, 'Case Report: Coca-Cola South Pacific' (Case Report 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>>.

160 See also Reeve, 'Self-Regulation of Food Advertising to Children', above n 154, 438–40.

attached to the AANA codes and the Initiatives alike. First, industry does not necessarily use public or external consultation processes when developing regulatory instruments, and the food industry certainly did not do so when drafting the two Initiatives. Such a practice today would run counter to the recommendations in the *Children's Rights and Business Principles* that companies consult with parents and children in actions concerning children.

In addition, administration and monitoring of much of the regulation is undertaken by an industry-based body (rather than an independent entity), with little in the way of participation by external interests.¹⁶¹ Two external representatives sit on the committee that administers the RCMI and QSRI, but they are outweighed by industry members (of which there are three), meaning that they are unlikely to have a significant influence over the administration of the self-regulatory scheme.¹⁶² In relation to monitoring, the Australian Food and Grocery Council has undertaken two monitoring exercises in the past, where it measured the number of unhealthy food advertisements in a sample of television programming it determined was directed to children.¹⁶³ It also summarises companies' self-reports of compliance and any complaint determinations produced by the ASB in an annual report. However, these actions do not meet the criteria of systematic monitoring against process and outcome indicators, undertaken by a body with no conflict of interests, as set out in the WHO's recommendations on food marketing to children.¹⁶⁴

None of the industry codes or initiatives provides for any sanctions to be applied to companies that breach the codes. They rely on the ASB as the main enforcement mechanism, but the ASB can only request that companies modify or remove offending advertisements. It cannot enforce its orders directly, although it may refer a complaint to a relevant government body where an advertiser refuses to comply, forward its decision to media proprietors or comment on the advertiser's lack of response in its determination.¹⁶⁵ Often determinations are made after a campaign has finished, preventing those determinations from having any impact on advertiser behaviour.¹⁶⁶ Further, the complexity of advertising regulation makes it difficult and time-consuming to lay a complaint about an advertisement. This may act as a barrier to members of the public complaining about advertisements that breach the RCMI and QSRI.¹⁶⁷ Together these

161 Ibid 444–5. See also Reeve, 'Private Governance, Public Purpose?', above n 154.

162 Reeve, 'Self-Regulation of Food Advertising to Children', above n 154, 445.

163 See Australian Food and Grocery Council, 'Food and Beverage Advertising to Children: Activity Report' (December 2010) 6 <<https://www.afgc.org.au/our-expertise/health-nutrition-and-scientific-affairs/advertising-to-children/>>; Australian Food and Grocery Council, 'Food and Beverage Advertising to Children: Activity Report', above n 67, 6.

164 World Health Organization, *Set of Recommendations on the Marketing of Foods and Non-alcoholic Beverages to Children*, above n 35, 11.

165 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, 10.

166 Mills, Martin and Antonopoulos, above n 157, 10.

167 Lumley, Martin and Antonopoulos, above n 155, 15.

weaknesses undermine the accountability and transparency of food industry self-regulation, as well as its likely efficacy.

In summary, Australian industry self-regulatory instruments contain a number of significant flaws in their objectives, substantive terms and conditions, and regulatory processes, including enforcement mechanisms. There is a significant disconnect between the WHO's recommendations on the design and objectives of food marketing policy, and the self-regulatory initiatives introduced by the food industry. This is the case despite the *Children's Rights and Business Principles* calling on companies to respect standards of business conduct set out in the WHO's recommendations, and the WHO's recommendations themselves encouraging businesses to 'follow marketing practices that are consistent with the policy aim and objective set out in these recommendations',¹⁶⁸ ie, reducing children's exposure to, and the persuasive power of, unhealthy food marketing. In this context, it is difficult to say that the codes and initiatives can be viewed as effective child rights protection mechanisms.

XI DO BUSINESSES INTERNALISE THE REQUIREMENTS OF SELF-REGULATORY INSTRUMENTS REGARDING FOOD MARKETING TO CHILDREN?

The concept of 'human rights due diligence' implies that industry-wide initiatives are not sufficient; rather food companies must also modify internal practices and policies to ensure that marketing activities respect the rights of children. Ruggie envisages that human rights due diligence processes can be built into due diligence processes and risk management systems already existing within businesses (eg, for assessing environmental or health and safety risks), with appropriate modifications.¹⁶⁹ The due diligence processes that Ruggie proposes resemble the core elements of impact assessment processes used to assess economic, social and environmental impacts,¹⁷⁰ as well as those found in corporate compliance systems. These include a written policy, staff training, high-level management commitment, dedicated internal experts, systems for handling compliance failures and complaints from customers or clients, monitoring mechanisms, and external reviews of the system.¹⁷¹

When they operate effectively, these forms of compliance systems or due diligence practices are a mechanism for 'responsibilising' companies, ie, for making them more open to ethical and social values, and ensuring that they are

168 World Health Organization, *Set of Recommendations on the Marketing of Foods and Non-alcoholic Beverages to Children*, above n 35, 11.

169 Guiding Principles, above n 12, 18; Office of the High Commissioner for Human Rights, *The Corporate Responsibility to Protect Human Rights: An Interpretive Guide*, above n 90, 35; see also Muchlinski, above n 93, 328; Harrison, above n 95, 109.

170 Harrison, above n 95, 108.

171 See Christine Parker and Vibeke Lehmann Nielsen, 'Corporate Compliance Systems: Could They Make Any Difference?' (2009) 41 *Administration & Society* 1; Christine Parker, *The Open Corporation: Effective Self-Regulation and Democracy* (Cambridge University Press, 2002).

responsive to the concerns of external stakeholders.¹⁷² In the context of human rights, the goal is to ensure that respect for human rights is integrated into every aspect of companies' operating procedures, policies, decision-making and other activities (eg, performance appraisal and award systems),¹⁷³ with the ultimate goal of generating an ethical or normative commitment to human rights that permeates the entire organisation.

There is little research on the extent to which the adoption of self-regulatory measures on responsible advertising to children by the food industry translates into changes in corporate practices and processes at the individual company level. This is perhaps because such research relies on food companies providing access to information about their internal practices which may be commercially sensitive, and which companies can be reluctant to share.¹⁷⁴ Unpublished research conducted as part of a PhD thesis used in-depth interviews with representatives from six large food manufacturers and one quick service restaurant chain that had joined the RCMI and QSRI to explore how companies complied with the Initiatives.¹⁷⁵ All interviewees said that their company undertook a range of measures to integrate the Initiatives' requirements into their internal decision-making structures and systems, including policy development, training and educating internal business units, and screening marketing material prior to broadcast or publication to ensure that it met the Initiatives' requirements.¹⁷⁶ Some companies also reported significant changes to their marketing practices to bring them into line with the requirements of the Initiatives.¹⁷⁷ Overall, this research found that adherence to the Initiatives formed an integral part of companies' business model, and that participants implemented internal processes and policies that reflected their companies' commitment to compliance.

This study had several limitations, including its limitation to the Initiatives and its small sample size, meaning that it did not give a representative picture of compliance practices throughout the Australian food industry. Monitoring of food industry initiatives by industry bodies finds very high levels of compliance,¹⁷⁸ apparently implying that companies are implementing the kinds of compliance systems needed to internalise the requirements of initiatives on food marketing to children. However, independent research suggests much lower levels of compliance than reported by industry.¹⁷⁹ For example, one Australian study found that Simplot (an RCMI participant) had screened an advertisement

172 Parker, above n 171.

173 Harrison, above n 95, 108.

174 See Christine Parker and Vibeke Nielsen, 'The Challenge of Empirical Research on Business Compliance in Regulatory Capitalism' (2009) 5 *Annual Review of Law and Social Science* 45.

175 Belinda Reeve, *The Food Pyramid Meets the Regulatory Pyramid: Responsive Regulation of Food Advertising to Children* (PhD Thesis, The University of Sydney, 2014) ch 9.

176 *Ibid* 277–82.

177 *Ibid* 282.

178 Australian Food and Grocery Council, 'Annual Compliance Report: 2015 Annual Compliance Report for the RCMI and QSRI', above n 150, 3.

179 See, eg, M Mar Romero-Fernández, Miguel Ángel Royo-Bordonada and Fernando Rodríguez-Artalejo, 'Compliance with Self-Regulation of Television Food and Beverage Advertising Aimed at Children in Spain' (2009) 13 *Public Health Nutrition* 1013.

for fish fingers 139 times in designated children's television viewing times during a three-month period, whereas industry reports said that there were 'occasional' screenings of the advertisement during this time.¹⁸⁰ This brings into question any claim that companies are in fact implementing the kinds of internal controls required by self-regulatory instruments. However, we identify a need for much more research in this area if we are to draw a conclusion on whether companies are implementing compliance systems that align their marketing practices with their commitments on marketing to children.

A more fundamental problem is that (as described above) industry self-regulation contains very weak standards that place few demands on participants. Accordingly, even if companies are ethically committed to compliance (and implement policies and practices that match this commitment), the codes and initiatives are still likely to do little to reduce children's exposure to unhealthy food marketing.¹⁸¹

XII STRENGTHENING CORPORATE ACTION ON UNHEALTHY FOOD MARKETING TO CHILDREN

A rights-based approach requires food industry actors to take a more broad-ranging approach to addressing marketing practices that have an adverse impact on children's rights, and to expressly consider the rights of children when designing self-regulatory measures on food marketing to children. An approach that took children's best interests as a primary consideration would require the food industry to close off the significant loopholes in its self-regulatory measures. This would include:

- Defining the goals of self-regulation as reducing children's exposure to, and the persuasive power of, food marketing;
- Applying the measures to advertising that is likely to appeal to children, not just advertising that apparently targets young people;
- Broadening the definition of 'advertising to children' to include that in media with a large absolute child audience, rather than a large proportion of audience made up of children; and
- Broadening the scope of the codes to apply to promotional channels and marketing techniques currently excluded from some or all schemes, including product packaging and labelling, premium offers, and equity brand characters.

These changes to the substantive terms and conditions of self-regulatory instruments should be accompanied by measures to strengthen the regulatory processes established by the various codes and initiatives. These could include independent, third party administration of the codes and initiatives, systematic

180 Michele Roberts et al. 'Compliance with Children's Television Food Advertising Regulations in Australia' (2012) 12 *BMC Public Health* 846.

181 See Reeve, *The Food Pyramid Meets the Regulatory Pyramid*, above n 175, 290–1.

monitoring of compliance and of impact on children's exposure to unhealthy food marketing, and meaningful sanctions for non-compliance.

The foregoing demonstrates the scope for a greater commitment to children's rights in the self-regulatory schemes developed by the food industry. However, where self-regulation remains the dominant form of food marketing regulation, industry action needs to be accompanied by greater oversight and leadership by governments, as discussed further below. This may include replacing self-regulation with co-regulatory or statutory schemes where self-regulation proves to be ineffective in reducing children's exposure to unhealthy food marketing.¹⁸²

Individual food companies should give consideration to how they can modify their internal policies and procedures in order to ensure that their marketing practices do not infringe children's rights. This could include integrating the requirements of self-regulation into internal decision-making, corporate policies, and employee education and training. As discussed above, there is limited evidence available on the extent to which companies already take these steps.

Companies could also consider their marketing practices when undertaking human rights due diligence. Nestlé's 2015 social responsibility report discusses the company's actions on food marketing to children, including the adoption of internal policies and objectives on marketing to children, its membership of industry-level commitments, such as the EU Pledge, the steps taken at a company level to implement these commitments, and the availability of a complaints-handling mechanism.¹⁸³ The report also includes (in a separate section) human rights reporting against the Guiding Principles Reporting Framework. This section of the report does not identify food marketing as a 'salient human rights issue',¹⁸⁴ but it does state that Nestlé has integrated concern for children's rights into a revised version of its *Marketing Communication to Children Policy*.¹⁸⁵ However, it does not describe how it has done so, which makes it difficult to evaluate Nestlé's commitment in this respect.

Our arguments here would lead to the conclusion that children's exposure to unhealthy food marketing should be considered a 'salient' human rights issue.¹⁸⁶ Companies may (quite rightly) focus on child rights issues such as child labour and protecting children's safety at work, which are critical threats to children's

182 For a comprehensive strategy for phased or 'responsive' regulation of food marketing, see Reeve, 'Self-Regulation of Food Advertising to Children', above n 154.

183 See Nestlé, above n 92, 83–9.

184 That is, engaging rights that are most at risk. See Office of the High Commissioner for Human Rights, *The Corporate Responsibility to Protect Human Rights: An Interpretive Guide*, above n 90, 8. The 11 salient human rights issues identified by Nestlé include matters such as freedom of association and collective bargaining, living wage, child labour, forced labour and land acquisition: Nestlé, above n 92, 228.

185 Nestlé, above n 92, 232, 237. In contrast, Unilever, another multinational company that produces food products, does not include any discussion of food marketing in its report under the UN Guiding Principles Reporting Framework, see Unilever, above n 92.

186 The idea that food marketing is a salient human rights issues that should be included in due diligence processes and reports under the UN Guiding Principles Reporting Framework was originally proposed by Anne Lene Løvhaug at the Oslo and Akershus University College of Applied Sciences, and forms the basis of her Master's thesis (which she was undertaking at the time this paper was written). The authors are grateful to be able to include her idea, and also for her input in this section of the article.

rights to development and to health. However, childhood obesity is also an important child health issue, including in developing countries where levels of childhood overweight and obesity are increasing, and the over-abundance of unhealthy processed food is a growing problem.¹⁸⁷ Further, a child rights framework should not be limited to children who are materially deprived, but should include children who live in conditions of relative comfort and safety, for whom over-nutrition is a significant health concern. Accordingly, consideration of food marketing practices should be integrated into companies' human rights due diligence programs, and reported on under the Guiding Principles Reporting Framework, in enough detail to enable external stakeholders (such as public health or child rights advocates and others who might be interested in or affected by companies' implementation of the Guiding Principles) to evaluate fully companies' actions on this issue.

There are other measures that the food industry could take in relation to food marketing in order to protect the rights of children. A growing body of research demonstrates how the food industry uses tactics that are similar to those of the tobacco industry in an attempt to prevent, stall, or weaken the introduction of government initiatives on diet-related health.¹⁸⁸ These tactics include funding research that is biased in favour of industry interests, lobbying against obesity prevention measures, and employing health experts as way of 'coopting the scientific conversation around public health and diet'.¹⁸⁹ The Guiding Principles require businesses to support state efforts to respect human rights, and if unhealthy food marketing to children infringes children's rights, then states should be able to implement new restrictions on this form of marketing free from obstructive industry lobbying.¹⁹⁰ The food industry should also ensure that it applies consistent standards for food advertising in both developed and developing countries (where unhealthy food marketing is rapidly expanding),¹⁹¹ and 'avoid[s] undermining efforts to restrict marketing in countries that receive food marketing from beyond their borders'.¹⁹²

187 See, eg, Nidhi Gupta et al, 'Childhood Obesity in Developing Countries: Epidemiology, Determinants, and Prevention' (2012) 33 *Endocrine Reviews* 48.

188 See, eg, Brownell and Warner, above n 27; Dorfman et al, above n 147; 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.

189 Simon, above n 26, 18. See also Melissa Mialon et al, "'Maximising Shareholder Value": A Detailed Insight into the Corporate Political Activity of the Australian Food Industry' (2017) 41 *Australia and New Zealand Journal of Public Health* 165; M Mialon, B Swinburn and G Sacks, 'A Proposed Approach to Systematically Identify and Monitor the Corporate Political Activity of the Food Industry with Respect to Public Health Using Publicly Available Information' (2015) 16 *Obesity Reviews* 519.

190 Kraak et al, 'Progress Achieved', above n 36, 545.

191 Cairns et al, above n 10, 213.

192 World Health Organization, *Set of Recommendations on the Marketing of Foods and Non-alcoholic Beverages to Children*, above n 35, 11.

XIII THE STRENGTHS AND LIMITATIONS OF AN APPROACH INFORMED BY THE GUIDING PRINCIPLES

The main focus of the Guiding Principles is on companies (and other industry actors) implementing measures to ensure that corporate practices respect human rights – for the purposes of this article, the rights of children as they relate to unhealthy food marketing. One of the strengths of this approach is that it draws the business sector into discussions on child obesity prevention and children's rights, and gives companies greater 'ownership' of their performance in relation to child rights.¹⁹³ Given that obesity is an 'industrial epidemic',¹⁹⁴ and the food industry plays a critical role in shaping dietary patterns, it makes sense to consider the role and responsibilities of businesses in relation to childhood obesity and children's rights. Considering the *Children's Rights and Business Principles* in the context of food marketing to children also strengthens the conceptual link between food marketing, corporate practices and children's rights, and provides guidance on the concrete steps that companies can take to modify their food marketing practices in line with a child rights-based approach. Appealing to the food industry to take voluntary action on food marketing to children may be one way of bypassing state inaction in this area.

However, there are significant limitations to this approach. The two statements of principles lend ethical and normative weight to the argument that companies should take steps to restrict food marketing to children. Yet there is no way to ensure that companies do so, nor any mechanism available to hold them accountable for their commitments.¹⁹⁵ This problem is related to the voluntary nature of both industry self-regulation and the Guiding Principles, neither of which contains any enforcement mechanisms. Also, the identification of food marketing as a child rights issue with implications for corporations is relatively new, and not all companies have yet taken the initial step of identifying unhealthy food marketing as a salient child rights issue, much less translated this into concrete changes to their corporate policies and practices.

Strengthening companies' commitment to restricting food marketing to children will require changes to the global governance framework for human rights as it applies to businesses, as well as improvements to the regulatory environment for food marketing, by both businesses and governments. Human rights advocates have called for the Guiding Principles to be replaced by mandatory, enforceable norms, which would empower NGOs and states to hold companies accountable for human rights breaches via the criminal law.¹⁹⁶ The idea of enforceable human rights norms for businesses is highly contested, but even if this is not practical, the governance processes created by the Guiding Principles could be strengthened in a number of ways. For example:

193 Harrison, above n 95, 108.

194 Jahiel and Barbor, above n 8; Gilmore, Savell and Collin, above n 8; Moodie et al, above n 8.

195 See also Boyd Swinburn et al, 'Strengthening of Accountability Systems to Create Healthy Food Environments and Reduce Global Obesity' (2015) 385 *Lancet* 2534.

196 See, eg, Bittle and Snider, above n 97, 189–90; Simons, above n 24.

- Companies could be required to disclose the full methodology and results of processes used to assess their human rights compliance;
- More robust processes for external engagement in human rights due diligence could be developed, accompanied by independent monitoring and review of companies' human rights due diligence;¹⁹⁷ and
- Companies that failed to adhere to the Guiding Principles could be 'named and shamed' through negative publicity and other 'soft' sanctions.

It may also be helpful for organisations such as the WHO to translate recommendations for policy development on food marketing to children into concrete steps that food companies and industry bodies can take in order to ensure that children are adequately protected from exposure to unhealthy food marketing.

The Guiding Principles present human rights due diligence as a 'win-win' for businesses and the communities in which they operate, but in reality, improving environmental performance or addressing workplace health and safety may have an impact on profit margins with little in the way of tangible benefits to corporate reputation, or any other kind of benefit to the company.¹⁹⁸ Similarly, stringent restrictions on unhealthy food marketing do not represent a 'win-win' for the food industry and public health: as noted, comprehensive restrictions that aimed to protect children from exposure to this form of marketing would risk interfering with food advertisers' ability to reach an adult audience because they would likely apply to general audience programs watched by both large numbers of adults *and* children.¹⁹⁹ Highly-processed, unhealthy products are some of the industry's most profitable, and there is little incentive for companies to stop marketing them to a wide audience, given that any measure that limited consumption of those products would risk an impact on the food industry's profits.²⁰⁰ Companies may be willing to take steps to protect against reputational damage by eliminating marketing practices that are perceived as misleading, deceptive or particularly exploitative of children, or that involve targeting promotions for unhealthy products specifically to very young children. However, they are unlikely to adopt more comprehensive restrictions on food marketing voluntarily – suggesting the need for government intervention.

197 Harrison, above n 95, 112–15.

198 Bittle and Snider, above n 97, 187–8.

199 Research by Jennifer Harris and colleagues find that expanding the definition of child-directed advertising to apply to programs with an audience of 20 per cent or more children would mean that the US *Children's Food and Beverage Advertising Initiative* would apply to approximately 70 per cent of food advertisements seen by children in the US, and one third of food advertisements viewed by adults. However, this latter figure would arguably be seen as high by food industry actors. See Jennifer Harris et al, 'Redefining "Child-Directed Advertising" to Reduce Unhealthy Television Food Advertising' (2013) 44 *American Journal of Preventive Medicine* 358, 362. See also 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, 128.

200 Ludwig and Nestle, above n 27, 1809.

The creation of a universal, normative framework that places human rights obligations directly on companies is a significant breakthrough in the global governance of transnational corporations.²⁰¹ This is particularly the case in an era when many large transnational businesses have budgets and power that rival those of some countries, but have previously been held to the same legal standards as small local businesses. On the other hand, an approach that focuses on *business* as the primary driver of food advertising regulation risks obscuring or negating the role and responsibility of governments in protecting children from exposure to unhealthy food marketing.

The Guiding Principles stress that governments retain the duty to protect human rights, and conceptualise government action as upholding or reinforcing business action on human rights.²⁰² As mentioned above, the WHO recommendations on food marketing to children also position governments as the leaders of regulatory and policy action on unhealthy food marketing to children.²⁰³ However, many governments encourage industry self-regulation of food marketing to children in lieu of statutory regulation (and without monitoring the efficacy of self-regulation), essentially handing over their responsibility for food marketing regulation to industry. Supporting industry self-regulation can be a relatively easy way for governments to appear to be doing something about unhealthy food marketing to children, while avoiding the political and financial costs of implementing statutory regulation.²⁰⁴ Human rights dialogue with business may be a valuable approach, but it must be seen as complementary to government action on unhealthy food marketing to children, rather than an alternative to it, especially in light of the evidence that industry self-regulation has so far been unsuccessful in improving children's food marketing environment.

Governments must show greater leadership in protecting children from exposure to unhealthy food marketing, particularly in countries such as Australia where the dominant form of regulation in this area remains industry self-regulation. This could include strengthening government oversight of industry initiatives by setting the objectives for self-regulation to achieve, prescribing definitions for key terms that self-regulatory instruments are based on, and undertaking monitoring and evaluation of the efficacy of food industry self-regulation. Governments should be prepared to escalate their level of intervention to co-regulatory or statutory restrictions on unhealthy food marketing, should self-regulation prove ineffective, or if the food industry proves unwilling to cooperate with government's efforts to reduce children's exposure to unhealthy food marketing.²⁰⁵ Governments could also encourage companies to pay greater

201 See Wetzel, above n 96, 195–6; Simons, above n 24, 34.

202 See Guiding Principles, above n 12, Principle 4; Harrison, above n 95, 111.

203 It is puzzling that the Principles refer to the WHO recommendations on food marketing to children, when in fact the recommendations have very little to say on businesses' obligations in relation to unhealthy food marketing to children.

204 See Roger Magnusson and Belinda Reeve, "Steering" Private Regulation? A New Strategy for Reducing Population Salt Intake in Australia' (2014) 36 *Sydney Law Review* 255, 267.

205 Reeve, 'Self-Regulation of Food Advertising to Children', above n 154.

attention to food marketing to children at a corporate level, for example by encouraging companies to integrate food marketing in human rights due diligence processes.

XIV CONCLUSION

We have presented the argument that exposing children to unhealthy food marketing breaches their rights under the UNCRC, specifically rights relating to children's health, survival, and development, the right to protection from injurious material in the mass media and the right to be protected from economic exploitation. Our article has taken the novel step of arguing that food companies have an obligation to take measures to address children's exposure to unhealthy food marketing, as a child rights protection measure, drawing upon the Guiding Principles and the *Children's Rights and Business Principles*. Industry self-regulatory measures on marketing to children in Australia do not fulfil this obligation, given the significant loopholes in the terms and conditions of the relevant codes and initiatives, and the flaws in the regulatory processes established by those measures, as well as the fact that they have done little to limit children's exposure to food marketing. While it is important for companies to internalise self-regulatory commitments in their policies, practices and procedures, there is currently very little evidence to show that they have done so. Accordingly, the food industry must make significant improvements to its codes and initiatives on food marketing to children, and ensure that companies modify their marketing practices in line with those requirements, if these are to truly operate as child rights protection measures. Finally, we have considered whether, overall, engaging food companies in a human rights dialogue is valuable to public health. While there are some benefits to this approach (such as strengthening the conceptual link between unhealthy food marketing, business activities, and children's rights), there are also significant limitations, and a focus on business action on unhealthy food marketing to children must not distract from the need for strong government leadership and engagement in this issue.

Appendix 1: Australian Regulators Relating to Food Advertising to Children

Type of regulation	ACL Statutory	CTS Statutory	CTCP Co-regulatory	CAMCC Self-regulation	FBAMCC ²⁰⁶ Self-regulation	RCMI Self-regulation	QSRI Self-regulation
Coverage	All business activity	C periods (260 hrs/year on 3 stations)	Commercial free-to-air TV; as for CAMCC and FBAMCC ²⁰⁷	All media except packages and labelling; product or service must be of principal appeal to children, and ad 'directed primarily to children'	Food ads in all media except packages and labelling + (2 nd part) 'directed towards Children'	Television, radio, print, cinema, internet sites where audience is predominantly children + ads 'directed primarily to children' (based on content)	Television, radio, newspapers, magazines, outdoor advertising, emails, interactive games, cinema and internet sites where audience is predominantly children + ads 'directed primarily to children' (based on content)
Child =	N/A	14 and under	14 and under	14 and under	14 and under	12 and under	14 and under
Misleading/ deceptive	All misleading or deceptive business conduct (including advertising), or conduct that is likely to mislead or deceive	No advertisement may mislead or deceive children	As for CAMCC and FBAMCC	As for CTS	1 st part: ads must be truthful and honest, communicated appropriately to target audience; 2 nd part: 'Particularly designed and delivered in a manner to be understood by ... Children'	N/A	N/A
Parents and 'peer power'	N/A	Ads must not be designed to put undue pressure on children to ask their parents or another person to purchase product for them	As for CAMCC and FBAMCC	Ad must not appeal to children to urge parents/guardians to purchase products for them, or undermine the authority, responsibility or judgment of parents or carers	As with CAMCC	N/A	N/A

²⁰⁶ Contains two parts: one general and one for children.

²⁰⁷ While the CTICP applies to television licensees, cl 5.7.1 states that television advertisers (but not licensees) are expected to ensure that their advertisements comply with the AANA's codes, including the CAMCC and FBAMCC.

	ACL	CTS	CTICP	CAMCC	FBAMCC	RCMI	QSRI
Premiums	N/A (unless misleading/deceptive)	Ad must not reference premium in a way that is more than merely incidental to the reference to the advertised product or service	As for CAMCC and FBAMCC	As for CTS + must not create a false and misleading impression in the minds of Children about the content of the product or that ad is for premium not product	Ad must not feature ingredients or premiums that are not an integral element of the product/s or services being offered	N/A	N/A
Personalities	N/A (unless misleading/deceptive)	Apply to a range of popular characters including a popular personality	As for CAMCC and FBAMCC	Must not use popular personalities/celebrities in a manner that obscures distinction between commercial promotions and program or editorial content	1 st part: prohibits use of 'associated sporting, news and/or current affairs personalities, live or animated' in ads 'appearing within segments of media devoted to general and sports news and/or current affairs' 2 nd part: as for CAMCC	N/A	N/A
Food	N/A (unless misleading/deceptive)	Must not contain any misleading or incorrect information about the nutritional value	As for CAMCC and FBAMCC	Must comply with FBAMCC; must not encourage or promote inactive lifestyle or unhealthy habits	All of the above + must not encourage excessive consumption	Advertising must be for 'healthy dietary choices' and promote a healthy lifestyle	As for RCMI
Product placement	N/A	N/A	N/A	N/A	N/A	Regulates use, including in interactive games, and advertising in schools	As for RCMI