

Protecting the child consumer from misleading advertising: A comparison of media regulation and consumer protection approaches

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This article compares two areas of legal regulation with a view to determining the strengths and weaknesses of each as a means of protecting children from misleading advertising. Media regulation, including self-regulatory advertising industry codes, has rules designed to address children's special vulnerability to advertising, but its application is limited by narrow definitions and concepts that are open to subjective interpretation. Therefore, it places few restrictions, in practice, on the kinds of advertising to which children are exposed. Section 18 of the Australian Consumer Law, by contrast, is broad and comprehensive in its coverage, but does not contain any special provision for children. The article examines the case law on s 18 and determines that there is scope, should an appropriate case arise, for the courts to adopt a test that takes into account children's cognitive development when determining what is misleading to a young audience. Therefore, consumer law has the potential to serve as a more effective protection for children's rights and interests as media consumers.

I Introduction

Children need special protection from advertising and marketing, and parents are not necessarily able to provide it. Therefore, law and regulation have an important role to play. The challenge of establishing regulations that have a sufficiently broad scope, yet are sufficiently well-targeted, to have a real impact on the kinds of advertising to which children are exposed raises the question of which area of law has the best tools for the job. Focussing on the issue of misleading conduct, this article compares and contrasts media law and consumer law as vehicles for regulating advertising and marketing communications to protect the child consumer. We identify certain shortcomings in Australian media laws that aim to protect children from advertising and marketing and explain why consumer law is likely to offer improved protection. Whilst media regulations include some protections that are closely focussed on children's needs, they are piecemeal and have limited coverage. Further, they rely heavily on industry self-regulation. Consumer law by contrast has broad coverage and is administered by a reasonably powerful regulator; the question is whether it is, or can be made, attuned to children's needs. In particular, it is necessary to know whether the courts would countenance a different test for what is misleading or deceptive, based on the likely presence of children in the audience for the conduct in question. Our original contribution is to show that while the cases so far have not squarely addressed the question of children's vulnerability, there are indications that consumer law is flexible enough to accommodate such concerns and that the courts would indeed countenance a higher standard for conduct likely to influence children, should an appropriate case arise. Our analysis suggests that consumer law could provide the best of both worlds: powerful regulation that is sensitive to the needs of the child audience.

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Part II of the article identifies reasons for affording to the child consumer additional protection from misleading advertising. Part III examines the key relevant media laws and regulations. Although these include provisions specifically intended to protect children from misleading advertising, we conclude that they in fact provide quite limited protection because of their narrow scope and children's actual patterns of engagement with the media. Part IV then examines the prohibitions against misleading conduct in the *Australian Consumer Law* ('ACL') and their possible application for the protection of children. Although these prohibitions are not drafted so as to provide protection to children specifically, case law suggests that consumer law has the potential to offer more effective protection to children from misleading advertising than its media law counterparts. For brevity, 'advertising and marketing' will be referred to compendiously as 'advertising' from now on.

II The child consumer (in context)

Children's professionals have been concerned for some time about the potential impact of advertising on children and their families. In 2004 the Task Force on Advertising and Children of the American Psychological Association, consisting of six internationally-renowned researchers, summarised the psychological evidence on that impact.¹

The Task Force reports that evidence shows that children under the age of about 5 are not able to distinguish between advertising and entertainment.² Then it is not until the age of about 8 that children start to develop an understanding of the intent behind advertising, namely that the advertiser is not trying to make their lives better, but rather to persuade them to purchase something.³ Even older children, and some adults, do not always apply the necessary scepticism when they encounter advertising.

Certain kinds of advertising are known to be especially effective on children, and are therefore seen to be especially in need of regulation. Examples are advertising involving endorsements from attractive celebrities⁴ and advertising offering some kind of extra reward or giveaway (especially of a collectible nature) with a product or service.⁵

Many people feel that the ultimate answer to protecting children from harmful influences by the media is that such protection is the parents' responsibility (and not the province of law or regulation). Therefore it is important to consider the nature of the child buyer and the relationship with his or her parents. First, we have known for a long time that advertising can inspire children to

¹ Brian Wilcox et al, 'Report of the APA Task Force on Advertising and Children' (Report, American Psychological Association, 2004).

² Ibid 5. See also Elizabeth S Moore, 'Children and the Changing World of Advertising' (2004) 52 *Journal of Business Ethics* 161.

³ Wilcox et al, above n 1, 5.

⁴ Ibid 29.

⁵ Ibid.

pester their parents to purchase.⁶ So parents' responsibility is not just to prevent children from seeing advertising, but extends to resisting pestering from their children.

Secondly, children have their own purchasing power, for example with money or gift cards given to them by friends and extended family for their birthdays or holidays such as Christmas. This means that parents must control either the amount of money given to their children, or what the children do with it. This is a difficult and complicated burden for parents, and it is unrealistic to expect that all or even most of them will be able to fulfil the responsibility alone.

Thirdly, children are known to have a direct influence over family expenditure, even on large purchases such as cars and holidays.⁷ This suggests that parents either see their children as legitimate contributors to such decision-making, or are unable to resist pressure from them.

If it is important that children be effectively protected, then others apart from parents should share the responsibility for protecting the child consumer. Indeed, the United Nations *Convention on the Rights of the Child* ('CROC') places an obligation on the Australian Government to 'render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities'.⁸ The question is how best to use our societal resources, and in particular the legal system, to support parents in the fulfilment of their responsibility.

The *CROC* provides further useful guidance in defining a legal approach to the protection of the child consumer.⁹ First and foremost it affirms that children require 'special care and assistance'.¹⁰ It is significant that even the most important statement of children's rights — a statement that goes a long way towards supporting their dignity and rights to be heard and to participate — recognises their vulnerability. This shows that such recognition is not necessarily paternalistic; rather it is factually accurate and potentially empowering.

Second, the *CROC* recognises that the mass media can be 'of social and cultural benefit' or 'injurious' to children. Article 17 provides (in relevant part):

States Parties recognize the important function performed by the mass media and shall ensure that the child has access to information and material from a diversity of national and international sources, especially those aimed at the promotion of his or her social, spiritual and moral well-being and physical and mental health.

To this end, States Parties shall:

- (a) Encourage the mass media to disseminate information and material of social and cultural benefit to the child and in accordance with the spirit of article 29; ...

⁶ The courts have acknowledged this in the consumer law context. See *Interlego AG v Croner Trading Pty Ltd* (1992) 39 FCR 348, 394 (see text accompanying below n 76).

⁷ Martha C White, 'American Families Increasingly Let Kids Make Buying Decisions', *Time* (online), 11 April 2013 <<http://business.time.com/2013/04/11/american-families-increasingly-let-kids-make-buying-decisions/>>.

⁸ *Convention on the Rights of the Child*, opened for signature 20 November 1989, GA Res No 44/25 (entered into force 2 September 1990) art 18(2) ('CROC').

⁹ See generally Elizabeth Handsley et al, 'A Children's Rights Perspective on Food Advertising to Children' (2014) 22 *International Journal of Children's Rights* 93.

¹⁰ *CROC* Preamble.

(e) Encourage the development of appropriate guidelines for the protection of the child from information and material injurious to his or her well-being, bearing in mind the provisions of articles 13 and 18.

Article 29 sets out the matters to which children's education should be directed, for example '[t]he development of the child's personality, talents and mental and physical abilities' and '[t]he development of respect for the child's parents'. Article 13 provides for children's freedom of expression, and art 18, as mentioned above, discusses the role of parents.

A legal or regulatory approach to protecting the child consumer can, and arguably should, take all of these concepts into account: recognition that children are vulnerable to exploitation and injury, yet entitled to information and other benefits from the media for their education among other things; and that parents need and deserve society's support in ensuring that children's rights are fulfilled and protected.

In spite of this recognition of support to parents as a matter of children's rights, the notion persists that parents alone can be expected to protect children against harmful influences from advertising.¹¹ Support for parents can take a wide variety of forms, but can certainly include legislation and regulation to remove some of the challenges that parents face. For example certain kinds of advertising appearing in certain places could simply be banned outright.¹²

III Media law and regulation

In this section, we examine the Australian framework for media regulation and find that it is fragmented as to the institutions involved and the kinds of media covered. We also examine the key relevant media laws and regulations that aim to protect children and conclude that they provide limited protection against misleading advertising.

1 The framework

Australian media law and regulation are divided across different media platforms. For a range of constitutional and historical reasons we have separate systems of regulation for broadcasting, films and games, print media and so on. For those same reasons, government regulation is focussed on broadcasting, but the industry self-regulatory systems apply to all media, including the internet. Many of the examples to be discussed are based on cases arising from 'old' media, but the rules apply equally to 'new' ones.

¹¹ Kaye Mehta et al, 'Parents' and Children's Perceptions of the Ethics of Marketing Energy-Dense Nutrient-Poor Foods on the Internet: Implications for Policy to Restrict Children's Exposure' (2014) 7 *Public Health Ethics* 21, 26.

¹² References in the article to media as a harmful influence on children are not intended in any way to suggest that the media are the only influence on children, or the only thing that could harm them, or that the influence is always harmful. However, for the purposes of our analysis we accept the evidence that advertising can influence children's thoughts, attitudes and behaviours in a range of ways, eg, by making them more likely to desire a product, more likely to pester their parents for a product, more likely to consume a product and more likely to have materialistic attitudes: Wilcox et al, above n 1, 30. We emphasise further that all of the evidence is about the *risks* posed by media use; it does not suggest that all children using certain media will be influenced in the same way.

The *Broadcasting Services Act 1992* (Cth) is the Commonwealth legislation under which the Australian Communications and Media Authority ('ACMA') regulates electronic media. Among other things, it confers power on the ACMA to determine standards for children's television¹³ (resulting in the *Children's Television Standards 2009* (Cth) ('CTS')) and to register industry codes of practice,¹⁴ which it then oversees (for example the Commercial Television Industry Code of Practice 2015 ('CTICP')). In parallel with this government regulation the Australian Association of National Advertisers ('AANA'), a private industry body, has developed a range of codes that apply to advertising and marketing communication on all media platforms.¹⁵ These codes are enforced by the Advertising Standards Board, another private body. Films and computer games come under the National Classification Scheme ('NCS'), which establishes a nationwide Classification Code ('Code') and guidelines addressing matters such as violence, sexual activity and coarse language. The Code and guidelines do not address the common phenomenon of advertising embedded in films and games, for example product placement.¹⁶ A unit within the Commonwealth Department of Communications and the Arts classifies material under the Code and guidelines, but the consequences of classification are enforced in each state under separate legislation.¹⁷ This legislation contains restrictions as to how the content can be advertised (for example requiring the display of classification symbols) but, again, no restrictions on advertising or marketing within the content itself. The NCS covers print material, but the only material that need be classified before being distributed is that which is 'likely to warrant restriction to adults'.¹⁸ Otherwise, the print media are overseen by the Australian Press Council, another private body. Its Standards of Practice do not apply to advertising.¹⁹ The NCS also extends to online content, via provisions in the *Broadcasting Services Act*, but these only restrict the distribution of material classified MA15+ or above.²⁰ Like the NCS generally, they do not squarely address advertising to children, in spite of the fact that this has exploded in recent years.²¹

2 Content of advertising regulation

The primary instruments that aim to protect children from advertising in Australia are the *Children's Television Standards 2009* (Cth), the Commercial Television Industry Code of Practice and

¹³ *Broadcasting Services Act 1992* (Cth) s 122.

¹⁴ *Ibid* s 123(4).

¹⁵ Eg, the AANA Code of Ethics (1 January 2012); the AANA Code for Advertising and Marketing Communications to Children (1 April 2014) (Children's Code); and the AANA Food and Beverages Advertising and Marketing Communications Code (August 2009).

¹⁶ Sandra Calvert, 'Children as Consumers: Advertising and Marketing' (2008) 18 *The Future of Children* 205, 208.

¹⁷ *Classification (Publications, Films and Computer Games) (Enforcement) Act 1995* (ACT); *Classification (Publications, Films and Computer Games) Enforcement Act 1995* (NSW); *Classification of Publications, Films and Computer Games Act 1985* (NT); *Classification of Films Act 1991* (Qld); *Classification of Publications Act 1991* (Qld); *Classification of Computer Games and Images Act 1995* (Qld); *Classification (Publications, Films and Computer Games) Act 1995* (SA); *Classification (Publications, Films and Computer Games) Enforcement Act 1995* (Tas); *Classification (Publications, Films and Computer Games) (Enforcement) Act 1995* (Vic); *Classification (Publications, Films and Computer Games) Enforcement Act 1996* (WA).

¹⁸ *Guidelines for the Classification of Publications 2005* (Cth) 5.

¹⁹ Australian Press Council, 'Statement of General Principles' (2014)

<https://www.presscouncil.org.au/uploads/52321/ufiles/GENERAL_-_PRIVACY_PRINCIPLES_-_July_2014.pdf>.

²⁰ *Broadcasting Services Act 1992* (Cth) sch 7.

²¹ See, eg, Susan E Linn, *Consuming Kids: The Hostile Takeover of Childhood* (The New Press, 2004); Donald L Shifrin et al, 'Children, Adolescents, and Advertising' (2006) 118 *Pediatrics* 2563.

the various AANA codes including the Code of Ethics, the Code for Advertising and Marketing Communications to Children ('Children's Code') and the Food and Beverages Advertising and Marketing Communications Code.

These instruments provide only patchy or partial protection, for the following reasons:

- Advertising is either not defined, or defined (and therefore regulated) in a narrow fashion.
- They include a requirement that advertising be 'directed to' children (or similar) before legal protections apply.
- The concept of what is misleading is constructed in a narrow and at times artificial way.

The analysis in Part IV suggests that prohibitions against misleading conduct contained in the *ACL* are not necessarily subject to similar limitations.

Communications covered

If an instrument uses 'advertising' or a related term as a regulatory category, one might expect it would define the term. Both the *Broadcasting Services Act* and the CTICP use the term, or a related one, in that way, but neither defines the relevant term. This flaw, at the very least, leads to uncertainty about the scope of the scheme, and if reliance is placed on consumers to complain (as it is under both instruments) it may limit effective enforcement. Members of the public are less likely to take the time to complain if they cannot be certain they can establish all elements of a breach.

Other media law instruments define advertising in such a narrow fashion that potentially misleading practices go unregulated. For example, the AANA Code of Ethics says that 'Advertising or Marketing Communications' ('AMCs') means:

any material which is published or broadcast using any Medium or any activity which is undertaken by, or on behalf of an advertiser or marketer, and

- over which the advertiser or marketer has a reasonable degree of control, and
- that draws the attention of the public in a manner calculated to promote or oppose directly or indirectly a product, service, person, organisation or line of conduct,

but *does not include*

- [labels or packaging for products
- corporate reports including corporate public affairs messages in press releases and other media statements, annual reports, statements on matters of public policy and the like
- in the case of broadcast media, any material which promotes a program or programs to be broadcast on that same channel or station]²²

The Children's Code uses the same definition, but limits coverage even further, to communications that are 'directed to' children and relate to children's products.

Labels and packaging are a highly important field of marketing to children, and their exclusion leaves children exposed to unregulated messages in that field.²³ Nor is there any reason in principle to treat advertisements for TV programs any differently from those for any other kind of product. After all, they can be pitched in a misleading way so as to suggest a program is appropriate for

²² AANA Code of Ethics (1 January 2012) 1 (emphasis added).

²³ Kaye Mehta et al, 'Marketing foods to children through product packaging: prolific, unhealthy and misleading' (2012) 15 *Public Health Nutrition* 1763.

children, when it is not. Already it is apparent that the AANA codes have only limited capacity to protect children from misleading advertising.

Directed to children

Many legal systems have acknowledged the evidence on the effects of advertising on children and have adopted rules to try to protect children from (some forms of) advertising.²⁴ Such rules need to introduce a way of defining the advertising to which they apply. The most common one is along the lines of a category of advertising 'directed to' or 'targeted at' children.²⁵ Even Sweden's famous ban on advertising to children on television is limited to that which is designed to attract the attention of children.²⁶

The AANA's definition of Advertising or Marketing Communications to Children is especially narrow:

Advertising or Marketing Communications which, having regard to the theme, visuals and language used, are directed primarily to Children and are for ... goods, services and/or facilities which are targeted toward and have principal appeal to Children.²⁷

In other words, both the style of the advertisement and the nature of the product or service being advertised must be directed or targeted toward children. There are many products — especially food products — which have some appeal to children but that is not their 'principal' appeal. Ads for such product would not be subject to the special protections that the Children's Code provides.²⁸

It is no easy matter to determine whether an advertisement is 'directed primarily to Children' (or similar). One notorious example of an advertisement that blurred the boundary was where a children's entertainer extolled the nutritional virtues of a chocolate-flavoured breakfast cereal. Clearly there was a strong argument that the combination of the presenter's profile and history and the nature of the product put the advertisement on the 'directed to children' side of the line. However, in response to a complaint, the broadcaster held that the advertisement was aimed at adults because of the way it was scripted.²⁹ The blurred nature of the boundary suggests a need for a clearer way of delineating the two types of advertising.

A more recent example involved a billboard carrying images of bakery products decorated with brightly-coloured sugar-coated chocolate buttons, coloured pencils and the message 'School

²⁴ See Elizabeth Handsley et al, 'Media, public health and law: A lawyer's primer on the food advertising debate' (2007) 12 *Media and Arts Law Review* 87; Elizabeth Handsley et al, 'Regulatory Axes on Food Advertising to Children on Television' (2009) 6 *Australia and New Zealand Health Policy* <<http://www.anzhealthpolicy.com/content/6/1/13>>; Handsley et al, 'A Children's Rights Perspective on Food Advertising to Children', above n 9.

²⁵ Eg, the British provisions use 'targeted at': see Broadcast Committee of Advertising Practice, *The BCAP Code: The UK Code of Broadcast Advertising* (Stationery Office, 2010).

²⁶ *Radio and Television Act* (Sweden) No 1996:844, s 4.

²⁷ Children's Code.

²⁸ This narrow definition also ensures that the Children's Code has no means of addressing the display in public places of advertisements for products and services such as brothels and sexual dysfunction treatments. Clearly those products have no appeal at all to children (at least one would hope they would not!). Yet this advertising is of strong concern to parents.

²⁹ Letter from Justine Cawood to Kaye Mehta, 22 July 2004.

lunches? Problem solved'. The Advertising Standards Board received complaints that such advertising was inappropriate because it was directed at children and aims at promoting unhealthy foods as an acceptable part of a school lunch. The Board held that the Children's Code did not apply because:

overall, the images used in connection with the large text referring to school lunches was [sic] very clearly targeting parents or carers of school aged children and was [sic] offering a solution for what could be included for school lunch ideas. In the Board's view, some elements of the advertisement would be appealing to children, particularly the images, but considered [sic] that overall the content is equally likely to be of appeal to parents and carers and is therefore not directed primarily to children under 14.³⁰

The above quotation shows the significance of the word 'primarily' in the Children's Code definition of advertising to children, but at the same time it shows how one element of the advertising (in this case the text as distinct from the images) is enough to lead to a conclusion that advertising is outside the scope of the Code.

The resolution of the complaints just mentioned also demonstrates that a 'directed to' test (or similar) turns on matters particular to the advertisement, and to the intent behind it. It pays little if any attention to the question of who will, in fact, be exposed to the ad. This makes it easy for advertisers to circumvent such tests with the way they design, script and pitch an ad. As we shall see, the child-protecting provisions described above can be contrasted in this regard with the approach taken under s 18 of the *ACL*.

In any case the whole concept of what is 'directed to' or 'targeted at' children leaves out of account the fact that ads can attract children's attention, and influence them, without being directed to them, primarily or otherwise. It needs to be remembered that the research establishing children's limited ability to deal with advertising was not on such a sub-set of advertising, it was on advertising generally. Therefore there is no justification for limiting regulations based on the idea that advertisements are directed to some people and not to others. A better-justified approach would be to pitch regulation to apply to *advertising which will attract children's attention*, irrespective of the intended or target audience. This would still require judgment about the individual advertisement, rather than the context in which it is communicated. It would keep the focus on children, and not allow advertisers to circumvent the regulations by manipulating the various elements of the message.

Alternatively, on the theory that children can be influenced by all advertising, there are strong grounds for regulating *advertising to which children will be exposed*. This is the approach the World Health Organization has favoured in its *Set of Recommendations on the Marketing of Foods and Non-Alcoholic Beverages to Children*.³¹ An example of its application would be to regulate advertising on television at times when there is a large child audience, for example a certain *proportion of the child population*. This is to be distinguished from those regulations that come into play when children

³⁰ Advertising Standards Board, *Case Report No 0072/17* (2017) 5 <<http://ms.adstandards.com.au/cases/0072-17.pdf>>.

³¹ World Health Organization, *Set of Recommendations on the Marketing of Foods and Non-Alcoholic Beverages to Children* (2010) Recommendation 2.

make up a certain *proportion of the overall viewing audience*,³² presumably on the theory that if adults are watching too, children are relatively protected because adults can explain the advertising to children. Whether this is realistic is open to question, especially when so many children have a television in their bedroom³³ or consume content on their own mobile device. If there is a serious desire to protect children, then the regulations should apply when a certain proportion of children are viewing, not when a certain proportion of the audience is made up of children.

Misleading advertising

The *CTS* provision, *CTS* 30(1), provides simply that ‘No advertisement may mislead or deceive children’ — thereby apparently requiring proof that children have been misled or deceived by the advertisement before a breach can be found. The drafters have given an indication that they see *CTS* 30 as very important, going on in para (2) to state that ‘Nothing in these Standards is to be taken to limit the obligation imposed by *CTS* 30’. Still, this says nothing about what that obligation actually is, and the words of para (1) make it clear enough that the obligation is quite limited.

CTS 30 was one of the provisions picked up by the previous iteration of the CTICP and applied to all television advertising directed to children. The ‘picking up’ provision has been dropped in the most recent review, which came into effect on 1 December 2015, but the CTICP still states that licensees are ‘expected to ensure that advertisements ... comply with’ the various AANA codes.³⁴

The Children’s Code section on ‘Factual Presentation’ contains the same wording as *CTS* 30:

Advertising or Marketing Communications to Children:

- (a) must not mislead or deceive Children;
- (b) must not be ambiguous; and
- (c) must fairly represent, in a manner that is clearly understood by Children:
 - (i) the advertised Product;
 - (ii) any features which are described or depicted or demonstrated in the Advertising or Marketing Communication;
 - (iii) the need for any accessory parts; and
 - (iv) that the Advertising or Marketing Communication is in fact a commercial communication rather than program content, editorial comment or other non-commercial communication.³⁵

Like *CTS* 30 this refers primarily to the actual impact of the advertisement (‘must not mislead or deceive’; ‘is clearly understood’), though para (b) does refer to the ambiguous nature of the advertisement itself.

³² Quebec, eg, uses 15 per cent: Office de la Protection du Consommateur, *Advertising Directed at Children Under 13 Years of Age: Guide to the Application of Sections 248 and 249 Consumer Protection Act* (2012) 29.

³³ Louise Hardy et al, ‘Weight status and weight-related behaviors of children commencing school’ (2012) 55 *Preventive Medicine* 433.

³⁴ Commercial Television Industry Code of Practice (2015) 5.7.1.

³⁵ Children’s Code s 2.2.

There are also provisions about misleading information as to the nutritional content of food. *CTS* 32(7) states that ‘An advertisement for a food product may not contain any misleading or incorrect information about the nutritional value of that product.’³⁶

This appears to suggest that an advertisement that gives an overall false impression about nutritional value is permissible under this provision, as long as any information provided is factually correct. This is because the requirement that *CTS* 32(7) imposes relates only to any nutritional information conveyed, and not to the advertisement itself. Therefore an advertisement for a high-sugar food might be able to give an impression that it is good for your health, by stating that it contains a certain level of calcium, but omitting reference to the sugar content: none of the *information included* would be misleading or incorrect. Such advertisements are not unknown. There are also advertisements for ‘fat free’ confectionery, which are misleading partly because they imply that other confectionery is likely to contain fat but also because they suggest that the product is relatively healthful. As we will see, consumer law adopts a different approach, consistently focussing on the overall effect of the communication so that, for example, fine-print disclaimers are ineffective. An important recent example of this principle in action, *Australian Competition and Consumer Commission v H J Heinz Co Australia Ltd*,³⁷ is discussed in detail below.³⁸

It is also possible that such advertisements would breach *CTS* 30: the statement in *CTS* 30(2) that nothing else in the *CTS* limits that obligation should include the loophole for food advertisements in *CTS* 32(7). On the other hand, as we have seen, *CTS* 30 requires proof that children were misled or deceived. *CTS* 32(7) requires only the inclusion of information that is ‘misleading or incorrect’ so in that sense it is a broader restriction.

The foregoing has provided examples of significant gaps in Australian media law and regulation that purports to protect children. In particular, that regulation applies only to a narrow sub-set of advertising, narrower than that which can reasonably be expected to influence children’s thoughts, attitudes and behaviour. Further, in doing so the regulations rely on a concept of ‘directed to’ that refers to some combination of the style and content of the advertisement and the type of product being advertised. Finally, even when they address misleading conduct the regulations are drafted in such a way as to leave significant loopholes open for advertisers. In the following section we examine the prohibition of misleading conduct under the *ACL* in order to determine whether it might be a more effective means of protecting children from the harmful influence of advertising. In particular, we shall see that when the *ACL* uses the concept of ‘directed to’ it is referring to the actual audience and/or to those likely to notice and be influenced by the conduct in question.

IV The Australian Consumer Law

³⁶ The same wording was replicated in 6.23.3 of the previous version of the CTICP even though the CTICP already picked up *CTS* 32 for application to advertising directed to children.

³⁷ (2018) 363 ALR 136 (*H J Heinz Co*).

³⁸ See text accompanying below nn 47–54.

In this section, we consider the prohibitions against misleading conduct contained in the *ACL*. This section also examines relevant case law with a view to assessing whether the misleading conduct prohibitions are likely to more effectively protect children from misleading advertising. There has not been a consumer law case involving conduct that would mislead children but not adults. However, cases involving misleading conduct in several different contexts (considered below) suggests that consumer law is able to take into account the different ways in which children are likely to respond to advertising when determining whether it amounts to misleading or deceptive conduct.

1 The framework

From 2011, Australia has had a truly national consumer law, the *ACL*. Most relevant for present purposes,³⁹ the *ACL* contains several provisions prohibiting misleading conduct.⁴⁰ These prohibitions apply in all states and territories to both individuals and bodies corporate. They aim to produce better outcomes for consumers by protecting them from misinformation, better enabling them to make efficient decisions. The focus on ensuring that misleading conduct does not threaten efficiency does not mean that the misleading conduct prohibitions could not be used to protect children's interests, for reasons explored below.

We will explore the prohibition against misleading conduct and associated case law in further detail below.

2 The relevant *ACL* prohibitions

The key provision of the *ACL* is the well-known s 18(1) (formerly s 52 of the *Trade Practices Act 1974* (Cth)). It states that:

A person must not, in trade or commerce, engage in conduct that is misleading or deceptive or likely to mislead or deceive.⁴¹

In addition, s 29 prohibits specific forms of false or misleading claims made in trade or commerce in connection with the supply or possible supply of goods or services, including false or misleading claims about the grade or composition of goods or services, and false testimonials or claims in connection with sponsorship or approval of goods or services. Section 29 is duplicative in that the specific representations prohibited would also amount to misleading conduct in breach of s 18, but it carries more weight because unlike s 18, its breach enables the Australian Competition and Consumer Commission ('ACCC'), the main consumer law enforcement agency, to seek the imposition of pecuniary penalties.⁴² Nevertheless the focus of the discussion below will be on s 18 because this has yielded the richest case law. It is routinely pleaded in most commercial cases,

³⁹ The *Australian Consumer Law* ('*ACL*') also contains prohibitions against unconscionable dealing, regulates unfair contract terms in consumer and small business contracts as well as regulates specific practices such as door-to-door sales as well as consumer safety standards. These prohibitions are not the focus of this article.

⁴⁰ It should be noted that a combination of state, territory and federal legislation that preceded the introduction of the *ACL* meant that such conduct was prohibited well before 2011.

⁴¹ The reference to a 'person' 'include[s] a body politic or corporate as well as an individual': *Acts Interpretation Act 1901* (Cth) s 2C(1).

⁴² *ACL* s 224.

whereas s 29 is rarely used by private litigants. That said, the approach to determining whether a representation is misleading in breach of s 29 is the same as that applied to determine if conduct is misleading in breach of s 18.⁴³

3 Better protection under consumer law?

There are three reasons why consumer law may better protect children from misleading advertising. First, the media regulations described above focus on the actual impact of conduct on children and on the accuracy of information contained in the advertisement. By contrast s 18 considers the nature of the impugned conduct itself ('conduct that is misleading or deceptive or is likely to mislead or deceive', not conduct that misleads or deceives). It is not necessary to prove that an individual was actually misled by the conduct nor will doing so necessarily prove a breach of s 18.⁴⁴ The inclusion of the words 'or likely to mislead' makes this clear. The advantage of this approach is that it simplifies the process by avoiding the need to prove that someone was actually misled by the conduct. It also has the effect of focussing attention on the conduct itself, rather than on its effect on a particular individual.

Second, case law has firmly established the need to consider the overall impression that the conduct creates, for example fine print disclaimers are often ineffective on the basis that they do not change the overall impression created by an advertisement.⁴⁵ Further, silence may amount to misleading conduct where there is a reasonable expectation that a matter would be communicated to the consumer.⁴⁶

*H J Heinz Co*⁴⁷ demonstrates the ineffectiveness of fine print disclaimers and shows how by focussing attention on the overall impression created by the advertisement, consumer law offers better protection against misleading representations about the nutritional content of food than media regulations such as *CTS 32(7)*. The ACCC alleged that the packaging of Heinz 'Little Kids' Shredz products was misleading, in contravention of ss 18, 29 and 33⁴⁸ of the *ACL*. On the front of the packaging there were depictions of an active healthy young boy engaged in tree climbing in

⁴³ See, eg, *Henderson v Pioneer Homes Pty Ltd [No 2]* (1980) 29 ALR 597, 609; *Thompson v Riley McKay Pty Ltd [No 3]* (1980) 43 FLR 293, 300. Although now dated, these were the first cases to confirm that the class of persons approach discussed in more detail later is applied to determine whether representations were misleading in breach of s 53 of the *Trade Practices Act 1974* (Cth), the predecessor to s 29.

⁴⁴ *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191 ('Parkdale').

⁴⁵ *Australian Competition and Consumer Commission v Harvey Norman Holdings Ltd* [2011] FCA 1407 (8 December 2011); *New South Wales Lotteries Corporation Pty Ltd v Kuzmanovski* (2011) 195 FCR 234; *National Exchange Pty Ltd v Australian Securities and Investments Commission* (2004) 49 ACSR 369; *Medical Benefits Fund of Australia Ltd v Cassidy* (2003) 135 FCR 1; *Cantarella Bros Pty Ltd v Valcorp Fine Foods Pty Ltd* (2002) ATPR 41-856.

⁴⁶ *Kimberley NZI Finance Ltd v Torero Pty Ltd* (1989) ASC 55-943; *Demagogue Pty Ltd v Ramensky* (1992) 39 FCR 31; *Miller and Associates Insurance Broking Pty Ltd v BMW Australia Finance Ltd* (2010) 241 CLR 357.

⁴⁷ *Australian Competition and Consumer Commission v H J Heinz Co Australia Ltd* (2018) 363 ALR 136.

⁴⁸ *ACL* s 29 prohibits specific types of false or misleading representations. Conduct caught by s 29 is very likely to also be caught by s 18. However, the ACCC can seek the imposition of penalties for breach of s 29. Penalties cannot be imposed for breach of s 18. Section 33 provides that a 'person must not, in trade or commerce, engage in conduct that is liable to mislead the public as to the nature, ... characteristics, the suitability for their purpose or the quantity of any goods'. Penalties can also be imposed for breach of s 33.

conjunction with the prominent pictures of wholesome fresh fruit and vegetables. The front of the box also contained the statement '99% fruit and veg'. The reverse side of the box contains the following statement:

Made with 99% fruit and vegetable juice and purees, these tasty treats are a fun and convenient snack for toddlers on the go. Our range of snacks and meals encourages your toddler to independently discover the delicious taste of nutritious food. With our dedicated nutritionists who are also mums, we aim to inspire a love of nutritious food that lasts a life time.⁴⁹

The side panel also contained a list of ingredients as well as a 'nutritional information' panel which disclosed, for example, the sugar content in the food (both in relatively small font).⁵⁰

The Court found that the overall impression created by the combination of imagery and words on the packaging involved the making of a representation by Heinz that the product is a 'nutritious food and beneficial to the health of children aged 1-3 years' (the 'Healthy Food Representation').⁵¹ This representation was said to be conveyed by the packaging as a whole and, in particular, by the repeated use of the word 'nutritious'. Despite the fact that the packaging also contained (in much smaller print) a nutrients and ingredients panel (which accurately disclosed nutritional information) the packaging was nevertheless held to be misleading. White J held that the nutritional information did not detract from the overall impression created, namely that the food is nutritious and beneficial to the health of young children. This was said to be because 'the eye of ordinary reasonable consumers generally is likely to pass over [the nutritional information] and ... respond to the dominant message conveyed by the more prominent words and imagery'.⁵²

The question then became whether the Healthy Food Representation was misleading. Whilst the ACCC failed to establish that the products in question were not nutritious (because the products contained 'some of the nutrients necessary to sustain human life')⁵³ it succeeded in establishing that the products were not beneficial to the health of young children aged 1-3 because of the product's high sugar content (the product was over 60 per cent sugar). Thus, the packaging was held to be misleading or deceptive.⁵⁴

As noted above, the focus on the nature of the impugned conduct (as opposed to its actual effects) as well as the focus on the overall impression created by the advertisement (as opposed to specific elements of it) are two respects in which the *ACL* carries greater possibilities for protecting children than media regulations do.

⁴⁹ *H J Heinz Co* (2018) 363 ALR 136, 139 [9].

⁵⁰ *Ibid* 142 [22].

⁵¹ *Ibid* 150 [72].

⁵² *Ibid* 156 [101].

⁵³ *Ibid* 163 [146].

⁵⁴ Heinz was ordered to pay the sum of \$2.25 million by way of a pecuniary penalty and ordered to establish, maintain and administer a consumer protection law compliance program for a period of 3 years. The ACCC also asked the Court to order corrective advertising, but this request was refused: *Australian Competition and Consumer Commission v H J Heinz Co Australia Ltd [No 2]* [2018] FCA 1286 (24 August 2018).

There is a third possible way in which consumer laws may offer broader protection — there is case law (considered below) that suggests that when determining whether advertising likely to be seen by children (but not necessarily directed at them, as would be required by media law regulation) is misleading, the question may be asked from a child’s perspective. Adopting such an approach it is possible that an advertisement that could not be said to be likely to mislead an adult could nevertheless be held to be misleading on the basis that children would be likely to be misled by the advertisement’s contents.

Prohibitions against misleading conduct, whether of a general or a specific nature, raise the question, exactly who must be likely to be misled in order for conduct to be found to be misleading? In all but the simplest cases (such as a case where a black t-shirt is described as a white t-shirt, something that would be misleading to all people), it is necessary to determine the likely effect on those likely to be exposed to, and influenced by, the conduct in question.⁵⁵ The courts do this by identifying a class or classes of persons likely to be affected by the conduct. Where the conduct is likely to influence multiple sub-classes (that is, different groups of consumers with different characteristics and abilities to process the information), the prohibition will be breached if any of the sub-classes are likely to be misled, a point we return to in more detail in the following section.

As the majority noted in *Campomar Sociedad, Limitada v Nike International Ltd (Campomar)*:

Where the persons in question are not identified individuals to whom a particular misrepresentation has been made or from whom a relevant fact, circumstance or proposal was withheld, but are members of a class to which the conduct in question was *directed in a general sense*, it is necessary to isolate by some criterion a representative member of that class. ... [W]here the effect of conduct on a class of persons, such as consumers, was in issue, the section must be ‘regarded as contemplating the effect of the conduct on reasonable members of the class’.⁵⁶

However, ‘directed’ in this context means something different from what we have just seen in the advertising regulation context: it focusses less on the nature of the conduct or the intent of the corporation, and more on the question of which part of the public that is *likely to encounter* the conduct. So, for example, conduct carried out by means of a billboard is ‘directed to’ everyone in society, or at least those members of society likely to be interested in the product being advertised.

Isolating the ‘representative member’ (or members of the relevant class or sub-class) involves an objective attribution of certain characteristics. For example, the ‘representative member’ may be treated as having some background knowledge of the subject matter to which the potentially misleading conduct relates that will affect how that person interprets the impugned conduct. As we will see, the ‘representative member’ may also be treated as being relatively susceptible to being misled because of certain characteristics, including age.

The reference to a ‘representative member of that class’ could suggest that the question of whether conduct is misleading is determined by reference to the hypothetical reaction of single

⁵⁵ *Campomar Sociedad, Limitada v Nike International Ltd* (2000) 202 CLR 45, 85 [103] (*‘Campomar’*).

⁵⁶ *Ibid* (emphasis added), quoting *Parkdale* (1982) 149 CLR 191, 199.

representative member of the class. If the single representative member of a group that includes children was identified as an adult, many of the limitations introduced by the ‘directed to children’ requirement in media regulation (discussed above) would also restrict the application of the misleading conduct prohibitions. However, as Greenwood J (Tracey J agreeing) noted in *Peter Bodum A/S v DKSH Australia Pty Ltd*,⁵⁷ there are many Full Federal Court authorities which determine whether conduct is misleading by asking whether a ‘not insignificant’ number of reasonable or ordinary people in the identified class would be likely to be misled.⁵⁸ Greenwood J acknowledged that *Campomar* may require that the effect of the conduct be tested by reference to a single hypothetical member of the class, but ultimately concluded that the appropriate test to apply was to ask ‘whether a not significant number of persons within the relevant section of the public would be misled or be likely to be misled’.⁵⁹ This approach seems consistent with Gibbs CJ’s view in *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* that ‘consideration must be given to the class of consumers likely to be affected by the conduct [which] may include the inexperienced as well as the experienced, and the gullible as well as the astute’.⁶⁰ It is also consistent with Dowsett J’s observation in *National Exchange Pty Ltd v Australian Securities and Investments Commission* that:

It is true that the High Court spoke of isolating ‘by some criterion a representative member of that class’. I understand that process to be more concerned with describing the class than with identifying any particular member.⁶¹

Further, in one of the most recent misleading conduct cases involving mass advertising to reach the High Court,⁶² the Court considered whether the conduct was misleading by identifying how an identified class of persons would react to the advertisement in question, not from the perspective of a ‘representative member’.

Applying this approach, it is not necessary to test the conduct against the likely reaction of all members of the relevant class in order to establish a breach of s 18. The prevailing view appears to be that a *significant proportion* of the relevant class must be likely to be misled, as reflected in Jacobson and Bennett JJ’s observation in *National Exchange Pty Ltd v Australian Securities and Investments Commission* that:

[a] finding that reasonable members of the class would be likely to be misled carries with it the determination that a significant proportion of [the identified target class] would be misled.⁶³

The ‘significant proportion’ approach confirms that the courts are alert to the fact that there is often considerable diversity within the relevant class or sub-class. As Kenny J noted in *Australian Competition and Consumer Commission v Henry Kaye and National Investment Institute Pty Ltd*:

In considering the effect of representations on the public, including their meaning, the court is to consider the effect on ordinary or reasonable members of the class in question. *This does not mean that the court cannot*

⁵⁷ (2011) 280 ALR 639.

⁵⁸ *Ibid* 680 [205].

⁵⁹ *Ibid* 681 [209].

⁶⁰ (1982) 149 CLR 191, 199.

⁶¹ (2004) 49 ACSR 369, 376 [25], quoting *Campomar* (2000) 202 CLR 45, 82 [103].

⁶² *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* (2013) 250 CLR 640.

⁶³ (2004) 49 ACSR 369, 384 [70].

consider the diversity of experience and knowledge within the class and other matters pertinent to members of the class.⁶⁴

4 Consumer law: A more nuanced approach

The reflection in the misleading conduct cases on the attributes, level of knowledge and likely cognitive abilities of the target audience, as well as the acknowledgment that the target group may be diverse, offers the potential for consumer law to confront the issue of children's exposure to misleading advertising more directly than media regulation allows. In the upcoming review of the relevant misleading conduct cases we will see that the courts are willing to recognise that conduct will influence multiple sub-groups of consumers and are willing to define the class (or one of the sub-classes) of persons to whom the conduct was directed by reference to age, where appropriate. This alone will not ensure that consumer law is more responsive than media law to children's exposure to misleading advertising, but it is still a significant advance on media regulation where so much exposure is missed because the advertising was not 'directed (primarily) to' children.

We will also see that another reason for consumer law's greater sophistication is that the misleading conduct prohibitions are not concerned with identifying a single group towards which the conduct can be said to be *primarily* directed. The courts are comfortable recognising that conduct may affect multiple sub-classes within the overall class of persons to whom the conduct is directed. The question of whether the conduct is misleading must then be asked from the perspective of each sub-class, acknowledging that each sub-class may interpret information in different ways. As noted above, conduct will be found to be misleading even if only one sub-class is likely to be misled by the conduct.

These principles are nicely illustrated by the decision in *Apotex Pty Ltd v Les Laboratoires Servier [No 2]*.⁶⁵ The respondents undertook a marketing campaign, aimed at discouraging the substitution of the respondent's drug, Coversyl, with equivalent, generic versions. Part of this campaign involved distributing stamps to doctors which stated that 'brand substitution was not permitted for Coversyl'. It was hoped that doctors inclined to prohibit brand substitution would apply this stamp to prescriptions issued. The applicant alleged that the stamp created the misleading impression that brand substitution was never permitted for this particular drug, when in fact the stamp would only be applied to scripts when a doctor had formed the view that, in a particular instance, brand substitution was not appropriate. Bennett J identified three relevant sub-classes of persons: 'medical practitioners (doctors), pharmacists and patients who take or who are prescribed' the drug in question.⁶⁶ It was clear that one of the groups towards whom the conduct was directed, doctors, would not be misled. However, this did not mean that the conduct did not breach the prohibition against misleading conduct. The conduct was found to be misleading on the basis that patients and pharmacists who viewed the stamp on a patient script would be led to believe that there was a general ban on brand substitution. Applying the reasoning in this case, if an

⁶⁴ [2004] FCA 1363 (22 October 2004) [107] (emphasis added).

⁶⁵ (2008) 77 IPR 1.

⁶⁶ Ibid 12 [57].

advertisement can be seen as directed at both children and their parents, the fact that the parent would not be misled by claims in the advertisement does not mean that s 18 will not be breached.

The courts will define the sub-class by reference to age where appropriate

The courts have, on several occasions, recognised that conduct was of significance for a particular age group. The Scottish passing off case *Topps Co Inc v Tom Hannah (Agencies) Ltd* provides a poignant example of where childhood is squarely in the frame:

the products are ... sold as confectionery for children and I have to consider what impression might be made on a child who goes into a typical corner shop clutching a 50p coin and gazes up at the whole range of confectionery on display, all competing by various forms of get-up and other attraction the child's attention and purchasing power.⁶⁷

In the consumer law context, the courts have been prepared to define the relevant class or sub-class, for the purposes of deciding whether conduct was misleading, by reference to age. In *Snoid v Handley*,⁶⁸ the applicants were members of the Sydney band 'Popular Mechanics' (formed in 1978, using the name from March 1979); and the respondents were members of a New Zealand band called 'Pop Mechanix' (formed in April 1979 and using the name since that time). Both bands played similar styles of music and appealed to the same section of the public. Both gave live performances and had records distributed in Australia and played on Australian radio stations. When considering whether the use of the respondent's band name ('Popular Mechanics') was misleading because of its similarity to the applicant's band name ('Pop Mechanix'), the Court identified the relevant class as:

[t]hose who are interested in the music which the [respondent's band] plays [who] are mainly young people between the ages of 12 and 30. At least half of them are of school age.⁶⁹

A second case also involved popular music. INXS, an internationally successful Australian band in the 1980s, brought a s 52 action over the sale of counterfeit merchandise at marketplaces.⁷⁰ The stall from which the counterfeit t-shirts were sold bore a sign stating 'bootleg T-shirts'. Other signs and labels indicated that the t-shirts had not been authorised by INXS. The applicants argued that each of the t-shirts, containing as each did the name 'INXS' and other symbols associated with the band, contained a representation that the t-shirt was produced or distributed by, or with the approval of, the members of the band. Wilcox J noted that:

[b]earing in mind the notorious fact that the proportion of persons in any given age group who are rock enthusiasts tends to diminish with increasing age, it is reasonable to assume that a major proportion of INXS followers are teenagers or persons in their twenties.⁷¹

It was therefore held that the class 'likely to be affected by the sale' of the t-shirts was limited to 'teenagers or persons in their twenties'.

The courts have also been prepared to acknowledge that younger age groups were likely to be affected by impugned conduct. In *Pacific Publications Pty Ltd v Next Publishing Pty Ltd*⁷² Pacific

⁶⁷ [1999] ScotCS 285 (1 December 1999).

⁶⁸ (1981) 38 ALR 383.

⁶⁹ Ibid 385.

⁷⁰ *Hutchence v South Sea Bubble Co Pty Ltd* (1986) 64 ALR 330 ('Hutchence').

⁷¹ Ibid 337.

⁷² (2005) 222 ALR 127 ('Pacific Publications').

Publications contended that Next Publishing had misrepresented to the public that its magazine *Girl Power* was affiliated or connected with Pacific Publications' magazine *Total Girl*. Pacific Publications submitted that it was either tweens themselves or the parents, guardians or carers who purchased the magazines on their behalf who may be misled. Tamberlin J seemed to accept that the conduct was directed at both groups, noting that:

the misrepresentation is broadly said to arise from the resemblance between *Total Girl* and *Girl Power* so as to create an impression *in the minds of the two aforementioned groups* that there is an association between the persons responsible for the publication or production of the two magazines.⁷³

In *Interlego AG v Croner Trading Pty Ltd*⁷⁴ the applicant argued that the claims on the respondent's packaging that the respondent's toy brick product 'WORKS WITH LEGO' were misleading. The applicant also alleged that the way in which the respondent's products were distributed created the misleading impression that those products were produced by, or with the consent of, the applicant.⁷⁵ In determining whether or not such a misleading impression would be created, Sheppard J implied that young children should be recognised as a sub-class, stating that:

[o]ne aspect of this case which needs to be remembered is that the case is about children's toys. Children are intended to buy or to ask parents and others to buy [the respondent's] products for them.⁷⁶

Finally, as noted above, even in cases where the court identifies the relevant class of person as a single class, 'the general public', the courts will consider the likely effect on younger people who, after all, fall within this widely defined class. A case that illustrates this involved a television advertisement for mobile phone ringtones, and will be discussed in more detail below.⁷⁷ In other cases, the courts have seen the conduct as being in fact directed both at children and at adults who may purchase goods for children. As will be discussed below, in such circumstances the courts have analysed the conduct by reference to the hypothetical adult consumer, noting that if the conduct was misleading to the hypothetical adult, the hypothetical child is even more likely to have been misled.

A finding that conduct is directed at younger people could in principle affect the analysis

As the previous discussion establishes, the courts seem more than willing to acknowledge children as the class or sub-class to which conduct is directed. This creates an opportunity for advertising to which children are exposed to be dealt with in a way that takes into account their special needs and characteristics, for example, their background knowledge (or lack thereof).⁷⁸ As the following discussion will demonstrate, this may lead to a conclusion that the representative child consumer is more likely or, in some contexts, less likely to be misled.

⁷³ Ibid 149 [92] (emphasis added).

⁷⁴ (1992) 39 FCR 348.

⁷⁵ Ibid 392.

⁷⁶ Ibid 394.

⁷⁷ See, eg, *Australian Competition and Consumer Commission v Global One Mobile Entertainment Ltd* [2011] FCA 393 (21 April 2011) ('*Global One*') (discussed below: see text accompanying below nn 87–92).

⁷⁸ *Butcher v Lachlan Elder Realty Pty Ltd* (2004) 218 CLR 592.

It seems reasonable to suggest that consumer law could also take account of children's less sophisticated cognitive abilities when assessing whether advertising is likely to mislead or deceive them. Professor Stephen Corones is of this opinion, noting the following when discussing how to determine whether advertising breaches s 18 of the *ACL*:

As a first step, it will be necessary to determine the nature of the class of consumers at whom [the advertising] is directed. This will involve considering matters such as *their age*, geographical location, sophistication, unusual predilections (if any) and familiarity with the subject. Generally speaking, higher standards of accuracy are expected in connection with advertisements directed towards unsophisticated or impressionable audiences *such as children or teenagers*.⁷⁹

There are a few s 18 cases involving allegations that conduct was misleading to a younger audience but unfortunately the case law so far contains little evidence of sophisticated reflection on the cognitive processes of children and teenagers. That said, there have been no signs of judicial hostility towards taking factors particular to children into account. It seems, rather, that the courts have not been presented with sophisticated arguments as to how younger people may interpret the conduct, and/or they have reached their conclusions in a way that did not require them to confront children's special needs and characteristics.

So then, what specifically have the courts done upon identifying that children or younger consumers were the (or part of the) class towards whom the conduct was directed? In some of these cases age, whilst acknowledged, has not featured heavily in the reasoning, while in others, the court has made an attempt to reflect on the reasoning processes of the particular age group but the analysis has been far from sophisticated. To illustrate this, we now return to some of the cases discussed in the previous section.

The 1981 case of *Snoid v Handley* provides an example of a case where age was acknowledged but did not feature heavily in the reasoning. As we have seen, the Court noted that '[t]hose who are interested in the music which Popular Mechanics play are mainly young people between the ages of 12 and 30. At least half of them are school age.'⁸⁰ It went on to say:

it was not only likely, but almost inevitable, that such conduct would mislead or deceive a significant number of *persons interested in music of the kind played by the two bands*. There is a great similarity in the names POPULAR MECHANICS and POP MECHANIX. The bands play similar music. They have a similar style on stage. Their audiences are *drawn from the same age group*. Their records are sold in the same shops. No reference is made on the record covers in which POP MECHANIX's records are sold to the fact that it is a New Zealand band. The bands play the same type of 'new music'.⁸¹

There was no explicit reflection on how the age of the hypothetical individual supported the suggestion that the conduct was misleading. The conduct was found to be misleading because of the similarity between the band names, the fact that the respondent and the applicant had a similar on-stage presence and because their audiences are drawn from the same age group.⁸² Although the

⁷⁹ S G Corones, *The Australian Consumer Law* (Lawbook, 2nd ed, 2013), [4.145] (p 150) (emphasis added). See also [4.80] (p 131): 'Higher standards of accuracy are expected where members of the intended audience are naïve, unsophisticated or impressionable'.

⁸⁰ *Snoid v Handley* (1981) 38 ALR 383, 385.

⁸¹ *Ibid* 388 (emphasis added).

⁸² *Ibid*.

target age group is mentioned, there is no suggestion that this age group would react to the aforementioned similarities any differently than would any other age group. That said, the relevance of the audience's age must be read as implicit in the Court's reasoning, as that is the only characteristic that had been referred to, and that 'persons interested in music of the kind played by the two bands' can be assumed to have in common. For example, there is no suggestion they would have a certain level of intelligence, education or sophistication or, to put it another way, no attempt is made to attribute to the 'representative person' characteristics other than age that might influence that way in which they would interpret the conduct.

Hutchence v South Sea Bubble Co Pty Ltd,⁸³ a case in which the Court determined the relevant class to be limited to teenagers and persons in their 20s, also contains little meaningful discussion of how age contributed to the finding that the conduct was not misleading. When determining whether the relevant conduct (the sale of bootleg merchandise) was misleading, the Court appears to have taken the view that these people, being young, were differently placed as consumers from the rest of the community in that they were *more savvy*⁸⁴ about bootlegging practices:

[C]ounsel for the respondents ... points to two matters: the facts that ... all sales on behalf of his clients have taken place at a stall at which there is some reference to 'Bootleg Industries' and have been of garments bearing what he calls a disclaimer of approval by members of INXS. ...

Many INXS fans, perhaps even the majority of them, would in the present case understand the word 'bootleg' to indicate that some or all of the merchandise offered for sale under that title was illicit in the sense of being unauthorized by the persons with whom it claims association.⁸⁵

Bearing in mind that 'INXS fans' is a class that the Court distinguished by reference only to the age of its members, and the Court had said they were a cross-section of the community in other respects, this reasoning seems to support the proposition that it is appropriate to use age as a basis both for defining a 'class' and for isolating any special characteristics of that class that will influence how that class may interpret the offering for sale of bootleg merchandising. That said, the judgment contains no explanation as to why people of the identified age were more likely to be familiar with bootlegging practices, a proposition vital to the ultimate conclusion that the conduct was not misleading.

The cases considered so far suggest that even where the court defines the relevant class by reference to age, this may not factor heavily or in a sophisticated fashion in the analysis of whether the relevant class would be misled. For example, there is little evidence of direct reflection on the different ways in which younger minds may process information. There is also little evidence of sophisticated analysis in cases where the courts recognised the young as a *part* of the relevant class or one of the relevant classes towards whom the conduct was directed. In *Pacific Publications* the Court recognised that the conduct was directed both at 'tweens' and at 'those who purchased

⁸³ (1986) 64 ALR 330.

⁸⁴ Children were also taken to be more sophisticated than their adult counterparts in *Childrens Television Workshop Inc v Woolworths (NSW) Ltd* [1981] 1 NSWLR 273 where Helsham CJ in Eq had to decide whether the distribution of counterfeit toy dolls by the respondent involved passing off. In doing so, Helsham CJ in Eq acknowledged that children may be less likely to think the counterfeit toys were supplied by the applicant as children would notice minor differences in the toys. This was said to suggest that children were in fact less likely to be misled by the counterfeit dolls.

⁸⁵ *Hutchence* (1986) 64 ALR 330, 338–9.

magazines for them' but failed to make any distinction between the two groups as to how they might view the marketing practices in question. This is evident in Tamberlin J's finding that the conduct was not misleading because the two groups would interpret the conduct in the same way, his Honour noting that:

there is substantial force in Next's submission that, given the age of the tween market and the absence of any evidence concerning the people who purchase magazines on behalf of tweens, *these two groups would give no consideration* at all to whether there is any association or affiliation between the publishers, producers or sources of the magazines or any links between the magazines so far as ownership, proprietary rights, reputation or approval are concerned.⁸⁶

*Australian Competition Consumer Commission v Global One Mobile Entertainment Ltd*⁸⁷ provides another example of a case in which the Court does not explore any distinction between younger and older consumers' thought processes, this time because it finds that an older consumer would be misled and infers from this that a younger consumer is equally or more likely to be misled. Unlike Tamberlin J in *Pacific Publications*, Bennett J does not identify younger consumers as a separate class. Rather, her Honour resolved the case by considering the effect of the conduct upon a reasonable adult. That said, there is no evident hostility to the notion that conduct may affect multiple classes and that one of those classes could be limited to younger consumers. Rather, Bennett J appears not to have identified a second class consisting of younger consumers because of a belief that doing so would be redundant given her conclusion that if an adult was 'likely to have been misled, it follows, in the absence of evidence to the contrary, that someone under the age of 18 would also be misled'.⁸⁸ There is nothing in Bennett J's judgment that suggests that had the applicant led evidence that younger consumers would interpret the advertisement differently, her Honour would have resisted recognising younger consumers as a separate group and reflected upon how that group would interpret the advertisement.

The ACCC alleged that in the course of the promotion on television of mobile telephone premium content services the two respondents had breached ss 52 and 53 of the *Trade Practices Act* (equivalent to ss 18 and 29 of the *ACL* respectively). The case against the companies turned on the fact that the service being promoted was a subscription, but information to this effect appeared only in small print at the bottom of the screen so consumers could be misled into thinking they were making a one-off purchase. One of the advertisements challenged featured a ringtone sampling a song by then-teen idol Justin Bieber. It was primarily broadcast outside of school hours and during normal school hours in the school holiday period.

Global One claimed that the target audience for the advertisement was women in the 18- to 24-year-old age group. Bennett J noted that Bieber, then about 15–16 himself, was extremely popular with young girls in the 13–15 age group and Global One appears to have accepted that Justin Bieber would appeal to under 15-year-olds. Her Honour said it was:

highly unlikely that a person under the age of 18, *let alone under the age of 15*, would notice, read or concentrate sufficiently to be able to read the writing. ... The use of the word 'subscribe' ... was totally inadequate to inform

⁸⁶ *Pacific Publications* (2005) 222 ALR 127, 149–50 [94].

⁸⁷ [2011] FCA 393 (21 April 2011).

⁸⁸ *Ibid* [70].

the adult viewer, *let alone if you are under the age of 18*, that what was being offered was a subscription to a broader service.⁸⁹

This clear recognition of younger people's relative credulity, vulnerability and need for protection remains obiter as her Honour resolved the issue by focussing on adults, that is, by determining that (even) an adult would not pay close attention to the on-screen text and thus would be misled by the advertisement. The judgment does indicate, however, without any discussion of the cognitive processes of the 13- to 15-year-old mind, that a person under the age of 15 would be even less likely than an older person, even someone as young as 18, to 'notice, read or concentrate sufficiently to be able to read the writing'.⁹⁰

On appeal the Full Court upheld the trial judge's finding. The Full Court also identified the relevant class as 'members of the general public who subscribe for mobile telephone services and whose interest is likely to be attracted by [the advertisement]'⁹¹ and found the conduct to be misleading because 'a not insignificant number within the class or cohort, would be likely to act on the footing [that the service was not a recurrent subscription]'.⁹²

Although not explicitly relevant to the conclusion reached, the reference to 'members of the general public ... whose interest is likely to be attracted' suggests that in a case where children's interest is especially likely to be attracted the court would take the special characteristics of the younger into account. This could be achieved by identifying younger consumers as a separate sub-class to which the conduct was misleading, as in *Pacific Publications*. Alternatively, even if the relevant class was defined as the 'general public', the conduct could be found to be misleading on the basis that younger consumers make up a 'not insignificant' part of that group that was misled by the advertisement.

The reasoning in *Pacific Publications* and *Global One* suggests that the answer to why the courts have not focussed on the special needs of the child consumer to determine what is misleading or deceptive may lie in the way that the hypothetical adult consumer is constructed for the purposes of s 18. Although the High Court in *Campomar* applied a test referring to 'the "ordinary" or "reasonable" members of the class of prospective purchasers',⁹³ Kapnoullas and Clarke rightly note:

It is probably fair to say that the majority of judges in the Federal Court have largely disregarded 'reasonableness' when discussing the typical consumer, and have tended to refer to such a consumer as ordinary or credulous.⁹⁴

⁸⁹ Ibid [19]–[20] (emphasis added).

⁹⁰ Ibid [19].

⁹¹ *Global One Mobile Entertainment Pty Ltd v Australian Competition and Consumer Commission* [2012] FCAFC 134 (14 September 2012) [111].

⁹² Ibid.

⁹³ *Campomar Sociedad, Limitada v Nike International Ltd* (2000) 202 CLR 45, 87 [105] (emphasis added).

⁹⁴ Stephen Kapnoullas and Bruce Clarke, 'Navigating "Muddied Waters": The Regulation of Mass Marketing and Advertising by Section 52 of the *Trade Practices Act*' (2008) 12 *University of Western Sydney Law Review* 103, 108. Later in the article, the authors cite *Australian Competition and Consumer Commission v Cadbury Schweppes Pty Ltd* (2004) 61 IPR 270, as an example of such a case, noting that 'the relevant person has scant resemblance to the reasonable person so familiar to those knowledgeable in tort and contract law' (at p 112).

The quality of 'credulity' is precisely one of those that is said to distinguish members of the child audience from their adult counterparts, so if it is being attributed to adults in any case there is less need to develop a separate standard for the protection of children.

Conclusion

The foregoing demonstrates that the regulation of advertising for the protection of children in Australia is quite weak. Although at first sight children's media law appears to put children's interests at centre stage, it encompasses formal distinctions based on the type of medium; it is severely limited in its application, because of tests relating to whether the content is 'directed [primarily] to' children; and its provisions relating to misleading or deceptive advertising contain significant loopholes.

By contrast, s 18 of the *ACL* contains a strong and general prohibition against misleading or deceptive conduct. It does not require proof that anybody was misled or deceived, and in a s 18 case, the focus is on the overall impression that conduct creates, including by what is omitted. Further, we have seen that the courts in misleading conduct cases under the *ACL* have demonstrated an appreciation that younger people may have distinctive thought processes. Whilst this has not (yet) led to the application of a higher standard of protection for children, there does not appear to be any judicial resistance to thinking about the impact of advertising from the child's perspective. That said, there is not yet a decided case where those observations have made a difference to the outcome, so they have never formed the basis for a binding ratio decidendi. Moreover, the construction of the special characteristics of the child audience has been relatively superficial, most probably because of the evidence that was led by the parties.

In other words, media law and consumer law have complementary weaknesses: the first has developed special obligations on industry in recognition of the distinct needs and interests of children, but the coverage of such recognition is narrow and patchy. Consumer law has broad and thorough coverage, but children's needs and interests have been given only implicit recognition, and the bounds of their significance have not been fully tested.

The question is which area of law is more likely to address these deficiencies first. As so much of children's media law is industry self-regulation, it is very unlikely that the coverage issues will be addressed any time soon. There is, however, the possibility of future litigation arising under s 18 that could require a court to deal with conduct that might not be misleading to an adult, but would be so to a child. This would present an opportunity for a court to give formal recognition to what is known about how children process information, and to set the standard accordingly for what is misleading.



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