

## **SUBMISSION BY THE ADVERTISING STANDARDS AUTHORITY OF NEW ZEALAND (INC) TO THE COMMERCE COMMISSION ON THE PROPOSAL TO EXTEND THE RESTRICTIONS ON MARKETING INFANT FORMULA**

### **Executive Summary**

- Thank you for the opportunity to comment on the proposal to extend the restrictions on the marketing of infant formula products to cover children up to 12 months old.
- The ASA notes the flexibility of self-regulation allows it to quickly respond to changes in marketing practice.
- The ASA supports the application of the Infant Nutrition Council to extend its Code of Practice to cover formula for infants from six to 12 months of age.
- The ASA notes this change will mean the Infant Nutrition Council New Zealand Follow-on Formula Marketing Guidelines will no longer be required and the Advertising Standards Code will be amended accordingly.

### **1. Information about the ASA**

1.1. The Advertising Standards Authority (ASA) is the self-regulatory body that regulates advertising standards in New Zealand.

1.2. The ASA has the following members:

Association of New Zealand Advertisers (Inc)  
Communication Council of New Zealand (Inc)  
Interactive Advertising Bureau  
Letterbox Media  
Magazine Publishers Association (Inc)  
Newspaper Publishers Association (Inc)  
New Zealand Community Newspapers Association  
New Zealand Cinema  
New Zealand Marketing Association (Inc)  
New Zealand Post Limited  
Outdoor Media Association of New Zealand  
Radio Broadcasters Association (Inc)  
Sky Network Television Limited  
Think TV

- 1.3. The ASA was established in 1973 and became an incorporated society in 1990.
- 1.4. The role of the ASA is to regulate advertising of products and services as permitted by law, including the right to freedom of information under the New Zealand Bill of Rights Act 1990.
- 1.5. The ASA has developed Advertising Codes of Practice to support responsible content and placement for all advertising in all media. In 2018, the Advertising Standards Code was released. The Code outlines the requirements for truthful and responsible advertising. In addition, there are five specialist codes with specific rules for advertising to children and young people and advertising gambling, financial products and services, alcohol, and therapeutic products and services.
- 1.6. The ASA funds and resources a separate and independent Advertising Standards Complaints Board (ASCB) that hears complaints from members of the public at no cost to them. There is a right of appeal to the Advertising Standards Complaints Appeal Board (ASCAB) which is also funded by the ASA.
- 1.7. Both Complaints Boards have a public member majority.
- 1.8. Complaints are received from members of the public. In 2017 the Complaints Board dealt with 603 complaints about 453 advertisements.
- 1.9. If a complaint is upheld by the ASCB, the advertiser, advertising agency and media are requested to withdraw the advertisement immediately. There is a high degree of voluntary compliance with these requests.

## 2. **ASA Jurisdiction**

- 2.1 The ASA Code for Advertising Food currently includes a reference to the Infant Nutrition Council's Code of Practice for the Marketing of Infant Formula in New Zealand (INC Code).
- 2.2 The ASA has released a new Code, consolidating six codes, including the Code for Advertising Food. The Advertising Standards Code comes into effect on 1 November 2018 for new advertising and 1 February 2019 for all advertising.
- 2.3 The Advertising Standards Code includes a reference to the Infant Nutrition Council's Code of Practice for the Marketing of Infant Formula and the Follow-on Formula Marketing Guidelines in the Guidelines to Rule 2(g).

The Guideline states:

“Advertisers of Infant and Follow-on Formula must take into account the requirements of the Infant Nutrition Council Code of Practice for the Marketing of Infant Formula in New Zealand and the Infant Nutrition Council New Zealand Follow-on Formula Marketing Guidelines, respectively.”

2.4 The ASA’s definition of “advertisement” states:

*“Advertising and advertisement(s)” are any message, the content of which is controlled directly or indirectly by the advertiser, expressed in any language and communicated in any medium with the intent to influence the choice, opinion or behaviour of those to whom it is addressed.*

*This captures a wide range of advertising activity that is controlled by the advertiser. It does not apply to product packaging (with the exception of alcohol products), bona fide news, reviews, editorial and broadcast content not controlled by advertisers.*

2.5 The ASA Codes of Practice are drafted using a Principle and Rule approach to allow a level of flexibility in their application. In particular – key considerations for the Complaints Boards in determining a breach of the Codes are context, medium, audience and product.

2.6 This allows a general set of rules to be applied across all advertisements in all mediums – taking account the particular features of each type of media. For example, the niche audiences targeted by radio and magazines, compared to the unrestricted reach of billboards.

### 3. **ASA Complaints Process**

3.1 The ASA website [www.asa.co.nz](http://www.asa.co.nz), includes a complaints form, information about the complaints process, our codes and a searchable decisions database.

3.2 The Complaints Board meets fortnightly to deal with complaints about advertising.

3.3 It is important to note that self-regulation in New Zealand is not just the formulation of codes of practice by the ASA and decisions on complaints by the ASCB. Self-regulation in the ASA model is much more complex. Codes and complaints resolution are clearly a key part of any successful system of self-regulation but the ASA system also includes education.

The ASA Chief Executive gives many seminars and presentations throughout the country on code compliance.

- 3.4 Media are also pro-active in monitoring the advertising that they accept. The Television Commercial Approvals Bureau is responsible for assessing advertising for code and legal compliance prior to being broadcast and other media have screening and advice services in place to ensure their risk of non-compliance is minimised.
- 3.5 In 2018, the ASA set up the AdHelp Information Service to offer assistance to agencies and advertisers on risks relating to advertising content and placement. This process complements the pre-vetting services for advertising alcohol and therapeutic products and services, along with advertising to children.
- 3.6 The level of transparency within the complaints system is also a key factor. Every complaint has a published decision. All decisions are released to the media and available on our website.
- 3.7 Self-regulation is an effective way of ensuring that advertising across all media is legal, socially responsible, not misleading, nor offensive. The ASA in New Zealand has developed systems over 45 years to create an efficient, effective complaints process for consumers and to support its vision of “every ad, a responsible ad”.

#### 4. Comment on the Draft Determination

- 4.1 The ASA has dealt with complaints about milk-based formula products for infants and toddlers for many years. This includes follow-on formula. The Infant Nutrition Council Guidelines on follow-on formula state:

##### **Follow-on Formula Marketing Guidelines**

*To avoid any confusion with infant formula, which is a breast milk substitute suitable for infants under six months of age, follow-on formula advertising and informational material prepared by INC companies should position this product as being suitable for:*

1. *infants already on infant formula when they reach the age of at least six months, and*
2. *infants of six months of age or over, who are receiving complementary foods.*

These Guidelines are used to assist the Complaints Board in considering whether an advertisement has been prepared with the required standard of social responsibility under the Code for Advertising Food.

- 4.2 The ASA understands that extended the restrictions on the marketing of infant formula products will mean that complaints under the INC Code for formula for children up to 12 months of age will be dealt with under the Ministry of Health monitoring process and the Compliance Panel.
- 4.3 The ASA will continue to deal with complaints about formula advertisements for children over 12 months.
- 4.4 A summary of complaints received about follow-on and toddler formula advertisements is in Appendix A.

**APPENDIX A**

**Summary of formula complaints to the ASA - 2013 to 2018**

Complaint No.	Advertiser	Issue and outcome
15/343	Kiaora Investment Group	<p>Fernbaby Baby Show website advertisement contained various claims about Fernbaby Premium Milk Formula including how the formula would enhance the digestive and immune systems of infants and the formula had proven health benefits for babies. Advertiser advised "we are happy to remove and alter the content which appeared to be making the health claims (unsubstantiated or not)." Complaint Settled (advertisement amended /removed)</p>
15/342	Nutriacare Group	<p>Nutriacare Baby Show website included claims in breach of the Code. The Advertiser apologised and said the statements that were subject to the complaint had been amended as well as the inclusion of a statement from WHO recommending that "human breast milk was the best for of nutrition for infants." Complaint Settled (advertisement amended /removed)</p>
14/331	Nestle New Zealand	<p>The advertisement stated in part "S-26 Gold Toddler helping to grow clever little minds. Specifically formulated to help support a toddler's learning and development." The Complainant said the claim "helping to grow clever little minds" was misleading because "it claims a health effect that will extend the development of little minds to well above normal, as "clever" is not a descriptor of normalcy in the general population"</p> <p>The Complaints Board said, when considered in the context of the advertisement, the claim "helping to grow clever little minds" was unlikely to mislead consumers, did not claim a nutritional effect and said the depiction of the toddler's motor skills in the advertisement was clearly hyperbolic and fantastical. Complaint Not Upheld.</p>

14/330	Nestle New Zealand	<p>The Complainant said the advertisement implied that the product was a regular, main source, of nutrition rather than a liquid component complementary food. The Complainant also said the advertisement made health claims around the Omega-3 and Omega 6 DHA which were not supported by the Ministry of Health.</p> <p>The Complaints Board said the likely consumer take-out of the advertisement would be that the product contained nutrients which helped with normal growth and development as part of a diversified diet and did not have any effect on neurological development. Complaint Not Upheld.</p>
14/329	Danone Nutricia	<p>The Complainant said the Karicare advertisement was promoting a follow-on formula product without fulfilling the industry's follow-on formula marketing guidelines the likely consumer takeout would be that the follow-on product is the next "stage" in breast milk substitution, replacing infant formula use rather than for complementary use alongside it.</p> <p>The Complaints Board said that the likely consumer takeout of the advertisement before it was to buy Karicare products, as an alternative to another brand of formula, rather than as an alternative to breast milk or breast feeding. It said the advertisement made no claims about the product and as such, did not breach the Follow-on Formula Guidelines. Complaint Not Upheld.</p>
13/453	Heinz	<p>Nurture Gold advertisement stated, in part: "while breast milk is best, if you chose to mix feed or move on, a great choice is Heinz Nurture Gold." The Complainant said there were many documented benefits of breast milk and mothers should not be deterred from breast feeding. The Chair said the advertisement showed a standing toddler, who was clearly over six months of age and the presenter acknowledged the importance of breast feeding. Complaint No Grounds to Proceed.</p>
13/372	Homecare Health Management Ltd	<p>The television advertisement for Lotcare on WTV showed the process of infant formula production with a Chinese voiceover which</p>

		<p>translated in part to "Lotcare's advanced infant milk powder formula has been developed for the concern of your baby health."</p> <p>The Complaints Board noted the response from the Advertiser that when they were made aware of the possible breach of the Advertising Codes from the Media, WTV, they changed the TV and Radio advertisements. Complaint Settled (advertisement amended /removed)</p>
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