

**The Advertising Standards Authority**

**Have Your Say: Further Consultation -**

**Draft Children’s Advertising Code &**

**Draft Food and Beverage Advertising Code**

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1. **Introduction**

**1.1** The New Zealand Beverage Council (NZBC) was established in 1993 as the industry association representing the non-alcoholic beverage sector. Our members are the brand owners, manufacturers, bottlers and suppliers of New Zealand’s juice, carbonated drinks, flavoured-dairy and bottled water brands—they range from some of the largest multinational brands in the world through to locally-owned, small boutique producers. NZBC currently represents over 75 per cent of the non-alcoholic ready-to-drink beverages sold at the retail level in New Zealand.

**1.2** The NZBC appreciates the Advertising Standards Authority (ASA) allowing a second round of feedback to be provided on the draft Children & Young People’s Advertising (CYP) Code and a new draft Food and Beverage Advertising Code.

**1.3** Since its introduction in 2017, the CYP Code has attracted strong compliance and applied high standards of social responsibility to advertising and marketing.

**1.4** In recent years, NZBC members have undertaken several initiatives to help New Zealanders make positive dietary choices for themselves and their families. Those include increasing the range of no-added sugar products, investing in innovation to offer smaller pack sizes and advertise using those smaller pack sizes, implementing the voluntary Health Star Rating labelling system on front-of-packs, and ensuring their products are not promoted or advertised directly to children—as outlined in the CYP Code.

**1.5** While the NZBC believes the current review is both timely and appropriate, the small number of complaints indicates that the current Code is working well. Indeed, the ASA records that between 2017 and May 2022, just 1.58 per cent of all complaints received concerned the CYP code.

**1.6** At the heart of good policymaking is problem definition. That means identifying the root cause of a problem, establishing the basic need for solving it, and then using that information to implement a solution. We are concerned there may be some unintended consequences from the changes being suggested.

**1.7** As we explain in the following sections, our members are concerned with aspects of both draft Codes, particularly the sections relating to Branding, Targeting, and Sponsorship. The NZBC believes the updated wording (left as is) creates significant complications for compliance and enforcement and stands to have cascading implications.

**1.8** The NZBC supports a framework that is evidence-based and linked to clearly identified problems in the Code. As the existing CYP Code is currently working successfully, the NZBC is wary of change for change’s sake, which may lead to additional issues.

**2.0 Executive Summary**

* The NZBC is concerned with the proposed guidelines relating to Targeting, Branding and Sponsorship. Indeed, our members have expressed reservations about the lack of specificity in many of the expanded definitions. We believe they stand to make a framework overly complicated and difficult to administer.
* The NZBC agrees in-principle with a separate Food and Beverage Code, provided its stated purpose is clear, evidence-based, and ultimately achieves greater harmonisation with Australia’s regulatory framework. Unfortunately, the draft Code moves New Zealand away from the successful model in Australia, and its capturing of brand advertising raises significant questions regarding the future funding of community events.
* The NZBC broadly supports the preliminary view of the Codes Committee to raise the definition of a child to under 16 years.
* We support using the Nutrient Profiling Scoring Criterion (NPSC) to assess what is an occasional food and beverage, including a definition of Advertising or Advertisements in that is in line with the Australian Code.

**3.0 Application of the Targeting Criteria**

3.1 Up until now, a key benefit of the three Targeting Criteria has been their simplicity, and practical nature to determine ‘targeting’. They are clear, easy to follow, well-written, and perhaps most importantly, do not require guesswork. The NZBC therefore questions the merits of expanding the criteria in the way the Committee has suggested. Our members deem the expanded wording to be overly restrictive, introducing greater subjectivity in application, and leading to potential unintended consequences.

3.2 The first expanded principle now reads:

* “1. Nature and intended purpose of the product, brand, service or message being advertised is principally or generally appealing to, or popular with, children or is typically consumed by children.”

3.3 The inclusion of “brand” is problematic. For example, a variable such as “popular with” or “generally appealing to children” is hard to measure. Taken at face value, it could capture most non-alcoholic beverage brands, particularly as the packaging is often bright and appealing to look at for all age groups.

3.4 The inclusion of “message” would lead to many subjective interpretations. Taken at face value, it makes informal words or phrases i.e. “OMG”, “FTW”, IKR, BTW, or “LOL” possible for inclusion. While these terms could be considered appealing to children, they are also sayings used by adults. The Code needs to ensure that any judgement regarding messages is done so consistently.3.5 The NZBC believes the use of “Principally” in 1(i) AND “Generally” in 1(ii) cast the net too wide. The result is too much subjectivity which is difficult to implement and to enforce.

3.6 The second expanded principle, which concerns the presentation of advertising (including content) that principally appeals to children, lists nine criteria as guidelines in the draft Food and Beverage Code. These include:

* "Individuals, groups or teams, including, but not limited to: cultural and sporting heroes or icons, celebrities and social media influencers.”
* Interactive applications, games, activities, websites and pop ups.”
* “Use of cartoons, imaginary characters, including animals, fantasy or virtual creatures.”

These are all very broad areas, where the above principle now also applies to common elements of packaging and advertising that are used extensively to market products to adults.

3.7 In the first round of consultation, the NZBC urged the ASA to provide more fulsome guidelines and examples to avoid unnecessary confusion. We also noted the need for a “real-world, holistic approach” to assessing the context in which advertisements may appear. Unfortunately, we believe that the above examples create greater confusion.

* With no mention of the analytics that might be used, alongside any explanation of thresholds, numbers, and the reasoning behind them, the reference of “cultural and sporting heroes, “icons”, and “social media influencers” is very open and too vague in definition.
* The reference to “games” is confusing and not easily measured. Adults and children both play games, and so how do we reasonably define the difference between a children’s vs adult’s game and apply this to new and emerging interactive online applications.
* With cartoons considered appealing to children, that would mean the use of any cartoons would be deemed as targeting children. However, cartoon shows that are directly primarily to adult viewers, e.g., South Park and Family Guy, and the multitude of adult graphic novels currently in circulation have not been considered adequately.

3.8 The third expanded principle for targeting states:

“Expected average audience at the time or place the advertisement appears includes a significant proportion of children. Examples include, but are not limited to:

i. Where tools are used to target children by age.

ii. Where tools are used to select channels, topics, or keywords relevant primarily to children.

iii. Use of influencers who are under 16 years or age.

iv. Use of influencers whose followers are 25% or more children.

v. Placement within content that is principally appealing to children or appeals to a wider age range including children. For example, but not limited to children’s programmes, artists, playlists, video, movies, magazines, games, websites and pop ups.

vi. Placement within designated children’s viewing and listening times.

vii. Placement at locations where children regularly and predictably gather. For example, but not limited to, within 300 meters of the sightline to the main entrance to schools.

viii. Where accurate data exists, placement in audiences where 25% or more of the audience are children.”

**3.9** The NZBC regards the language of principle three and accompanying criteria as too broad. This is reflected by the positioning of the 25% audience composition threshold, which is secondary to a “significant proportion of children.” This is despite the latter being undefined. Instead of sitting alongside other criteria (where there is no stated hierarchy), the NZBC believes it helpful if the 25% audience threshold sat as the core definition.

**3.10** The NZBC is similarly concerned by the additions of “regularly and predictably gather.” This is a departure from the extant Code and use of the word “gather.” The proposed wording has the ignominy of creating ambiguity when none previously existed. The issue is ultimately one of scope and what would and would not be captured – for example, local shops near a playground, gaming arcades, or the inside of a shopping mall could be considered in scope.

3.11 As mentioned in our first submission, and in para 1.5, there appears to be no evidence that a ‘confusion’ exists in relation to the definition of ‘targeting.’ The extant definition of targeting, and its underpinning criteria, has also allowed the Complaints Board to take a real-world, holistic, and pragmatic approach when considering whether an advertisement is targeting children. As a result, we ask Committee to reconsider the prescriptive guidelines it is proposing.

**4.0 Brand & Sponsorship Advertising**

**4.1** The NZBC is concerned that the inclusion of ‘brand advertising’ under the Draft Food and Beverage Advertising Code creates significant issues for advertisers, especially in relation to Sponsorship Advertising. Respectfully, we do not understand the intention of the proposed Rule 1(c) of the Draft Food and Beverage Advertising Code. It appears to prohibit any sponsorship advertisement from including product placement, regardless of the target audience of the advertising. The NZBC considers that this would be a dramatic shift from the current CYP Code and the rules set out under Australia’s AANA Food and Beverage Advertising Code. Mainly, this proposed rule does not include the critical threshold of ‘targeting children’ meaning that all sponsorship advertisements are captured.

**4.2** While Rule 1(c) could be a drafting issue, such a prohibition would deprive sports teams (both at the elite and grassroots level) and sporting events of a critical revenue stream. Community and cultural events that rely on similar funding would also be at risk. Given the significant potential repercussions, the NZBC believes this issue needs further evidence and consultation, including with agencies which promote and fund sporting and cultural activities in the community.

**4.3** The proposed OFB wording is not aligned to the Australia’s equivalent framework.

**4.4** Section 3.1 of the Australian Association of National Advertisers’ (AANA) guidance on OFB, which is equivalent to Rule 1(b) of the draft Food and Beverage Code, states that:

* “Advertisers must be able to demonstrate that they have evaluated or that care has been taken to evaluate the expected average audience composition before the placement of Occasional Food or Beverage advertisements to ensure they are not targeted at children.”

**4.5** The problem with the updated guidance in rules 1(b) and 1(c) is that they represent a significant departure from those in Australia. The clearest example of this departure is in the word “synonymous,” which the NZBC believes should be removed from the guidance of both.

**4.6** NZBC takes this position because “synonymous” could be interpreted as brand or sponsorship advertising related to a corporate or overarching company brand.

**4.7** The Codes Committee will be aware that many of our members sell beverages that are not classed as an OFB in the NPSC framework. Common examples include flavored milk and the different types of kombucha. However, as written, these could fall under the rules because of the brand/product they are “synonymous” with (which is not classed as an OFB). For instance, what happens if one of our members is promoting a sugar free drink, yet the product also includes a brand name that is “synonymous” with an OFB. How would synonymous be defined?

**4.8** The question that then needs answering is whether the nutrient profiling system supersedes brands synonymous with OFB. For that reason, a clearly understood hierarchy of criteria is necessary.

**4.9** With the wording around brand and sponsorship advertising unclear, the NZBC believes the solution is replacing 1(b) and 1(c) of the draft Food and Beverage Code with Sections 3.1 and 3.2 of the AANA’s Food and Beverages Advertising Code. Adopted to the draft Code under discussion here, it would provide a basis (within stipulated boundaries) for companies/ brands that sell OFB products to continue to sponsor teams and events.

**4.10** Notwithstanding this fix, there are also significant consequences inherent with what is proposed in Rule 1(c) 2. Prohibiting branded merchandise targeted at children, or in children’s sizes, not only puts us offside with Australian regulations, but it places New Zealand as an outlier when compared to other jurisdictions in this part of the world.

**4.11** The NZBC believes the ASA’s draft Food and Beverage Code runs the risk of leading to unintended outcomes. The inclusion of brand names and logos in Rule 1(c) (2) is concerning as it will have major implications on streams which are currently critical to the running of community events and local sport around New Zealand.

**5.0 Nutrient Profiling System**

**5.1** As stated in the ASA’s consultation document, the current Code employs the Food and Beverage Classification System (FBCS) and Health Star Rating (HSR) to determine if a food or beverage is considered for occasional consumption.

**5.2** The NZBC supports shifting to the Nutrient Profiling Scoring Criterion (NPSC) when assessing what is an occasional food and beverage. Significantly, it would bring us into alignment with Australia and FSANZ.

**5.3** However, the NZBC would like to see the wording of the definition in the draft Food and Beverage Code tightened. In the draft Code, Occasional Food and Beverage(s) are described as “food and beverage products that are high in fat, salt or sugar (HFSS) …”

**5.4** The NZBC recommends removing the reference to HFSS and reverting to the NPSC framework. We believe it preferable to provide industry with one clear definition.

**6.0 Summary of Recommendations**

**6.1** New requirements for Targeting, Brand & Sponsorship Advertising must align with equivalent standards in Australia. If the ASA decides not to, it must clearly explain the reasons why and supply a solid evidential basis for doing so.

**6.2** On the three new targeting principles, the NZBC ask that the ASA tighten the wording. This would go some way to the negating the likely unintended consequences from the principles as drafted. We also ask that, where several interpretations exist (e.g., para 3.4), the ASA establish hierarchies. This will help both industry and those tasked with administering both Codes. In the absence of such change, the ASA supports maintenance of the status quo.

**6.3** The proposals for Branding and Sponsorship Advertising remain problematic. Put simply, the NZBC does not support them in their current form. However, solutions do exist. The most important of these is replacing 1(b) and 1(c) of the draft Food and Beverage Code with Section 3.2 of the AANA’s Food and Beverages Advertising Code. This would at least provide a basis (within stipulated boundaries) for companies/ brands that sell OFB products to continue to sponsor teams and events.