

Regulation of Food Advertising to Children in New Zealand

Simon Hoffmann

A dissertation submitted in partial fulfilment of the
degree of Bachelor of Laws (Honours) at the
University of Otago, Dunedin

October 2014

Acknowledgements

I would like to thank -

Selene Mize, for taking me on as your fourth supervisee, your comprehensive and encouraging feedback and guidance, and for your late night edits during the crucial last weeks;

My parents, for your endless support;

Kari Schmidt, Mahoney Turnbull, Megan Paterson and Anton Jackson-Smith for your razor-sharp minds, senses of humour and contagious energy;

Mel Shaw, for your love, laughter, patience and visits throughout the year.

Table of Contents

Introduction	1
Part I. Food Advertising and Obesity	2
A. Obesity in New Zealand.....	2
B. The relationship between food advertising and obesity.....	2
C. The Prevalence of HFSS advertising in New Zealand	6
Part II. HFSS Advertising Regulation In New Zealand	8
A. The Regulatory Actors	8
1. The Advertising Standards Authority	8
(a) The ASA Food Codes.....	10
2. Television Self-Regulators	10
3. Public Health Bill 2007	12
B. A Comparison of the Regulatory Actors.....	13
1. Defining foods to be restricted or controlled	13
2. Viewing Times	17
C. A Critical Analysis of the ASA and its Handling of Complaints	20
1. General Critique	20
2. Analysis of Complaints: Interpreting what counts as advertising to children.....	25
3. Analysis of complaints: Use of precedent	32
4. Targeting parents vs. children.....	36
5. Analysis of complaints: Negative messages towards healthy items.....	37
D. Overseas Approaches	37
1. Quebec (complete ban)	37
Part III. Rights Implications and Legitimacy of Advertising Restrictions	42
A. Freedom of Expression.....	42
1. Is the ASA subject to the NZBORA?	42
2. Application of NZBORA to commercial expression.....	44
3. A middle ground approach	48
B. Children's Rights	50
C. Paternalism and Personal Responsibility	52
Conclusion	57
Appendix 1. The NZ Advertising Standards Authority Children's Code For Advertising Food 2010	60
Appendix 2. The NZ Advertising Standards Authority Code for Advertising of Food.....	63
Bibliography	65

Introduction

New Zealand has one of the highest rates of childhood obesity in the OECD. Many experts have attributed the prevalence of obesity to environmental factors. One of these factors is advertising of unhealthy foods (often referred to as high fat, salt and sugar (HFSS) or energy dense, nutrient poor (EDNP) foods). This has led to calls for further advertising restrictions on such products. This dissertation aims to evaluate the New Zealand regulatory approach to HFSS food advertising to children.

Part I introduces the issue of childhood obesity, reviews the evidence of the relationship between advertising and childhood obesity and examines the prevalence of HFSS advertising in New Zealand.

Part II examines how HFSS advertising is regulated, including a descriptive account of the multiple self-regulatory actors involved and a critical analysis of the approach taken by them, including recommendations for improvement and a contrasting overseas approach.

Part III considers advertising restrictions from a rights based perspective, and contains analysis of restrictions of freedom of expression under the New Zealand Bill of Rights Act 1990 (NZBORA), s 14 and the United Nations Convention on the Rights of the Child (UNCROC), followed by a more theoretical discussion of freedom of expression and paternalism.

Part I. Food Advertising and Obesity

A. Obesity in New Zealand

Obesity and overweight (defined as “abnormal or excessive fat accumulation that may impair health”)¹ are significant problems in New Zealand. One in nine children (aged two to 14 years) are obese, and one in five overweight, with higher rates for Maori and Pacific children.² 2012 data showed that New Zealand has the third highest percentage of obesity and overweight in both adults (defined as people aged 15 or over) and children (defined as those between five and 17 years old) in the OECD.³ Obesity in children is associated with a number of health problems, both physical and psychological. Obese children are likely to also be obese as adults and thus have an increased risk of further health problems, notably Type Two diabetes.⁴ The annual cost of obesity-related health problems (including health-care and lost productivity) is estimated to be between \$722 and \$849 million.⁵

B. The relationship between food advertising and obesity

Many experts attribute the prevalence of obesity to an “increasingly ‘obesogenic’ environment – one that promotes over-consumption of food and drinks and limits opportunities for physical activity.”⁶ Part of this environment includes advertising of

¹ World Health Organisation “Obesity and overweight: Fact sheet 311” (August 2014) World Health Organisation <www.who.int>.

² Ministry of Health “Obesity data and stats” (9 July 2014) Ministry of Health <www.health.govt.nz>.

³ OECD Directorate for Employment, Labour and Social Affairs “Obesity Update” (June 2014) OECD <www.oecd.org> adult data at 2, children data at 4.

⁴ Ministry of Health “Obesity questions and answers” (13 January 2014) Ministry of Health <www.health.govt.nz>.

⁵ Anita Lal and others “Health care and lost productivity costs of overweight and obesity in New Zealand” (2012) 36 Aust N Z J Publ Heal 550 at 553.

⁶ Ministry of Health, above n 4; see also B Swinburn and G Egger “Preventive strategies against weight gain and obesity” (2002) 3 Obes Rev 289 at 292 who state that the term obesogenic environment “is broader than just the physical environment and includes costs, laws, policies, social and cultural attitudes, and values” (my emphasis).

unhealthy foods (often referred to as high fat, salt and sugar (HFSS) or energy dense, nutrient poor (EDNP) foods):⁷

“Stated simply, the theory is premised on the assumption that advertising of food products alters consumers’ preferences for foods so that they consume more of the advertised foods than they would have absent the advertising. That is, for example, ads for fast food cause increased overall consumption of fast food. As applied to the issue of childhood obesity, it is observed that there is a substantial amount of advertising for relatively unhealthy foods, such as sugared cereal, candy, salty snacks, and the like. In turn, this advertising is converted into increased demand for those products.”

This theory has led many to call for bans or restrictions on such advertising.⁸ This is consistent with a focus on prevention in children, due to the difficulty of treating obesity once it is established.⁹ Further, it is often assumed that children lack the cognitive defences to withstand the coercive effects of advertising and hence need protection until they can understand its nature and intent,¹⁰ although studies have shown that “even an understanding of persuasive intent can fail to protect older children from experiencing increased desire for products as a result of advertising exposure.”¹¹ There is also an emerging body of work demonstrating that HFSS food advertisements can influence adults’ perceptions of the desirability and (more importantly) the appropriateness of such foods.¹²

⁷ Todd J Zywicki, Debra Holt and Marueen K Ohlhausen “Obesity and Advertising Policy” (2003) 12 Geo Mason L Rev 979 at 992; Note also that Ministry of Health *Food and nutrition guidelines for healthy children aged 2-12 years* (Ministry of Health, Wellington, 1997) at 7 states that diet composition, rather than total dietary energy intake appears to have a greater influence on fat gain.

⁸ See generally G Jenkin and others “A systematic review of persuasive marketing techniques to promote food to children on television” (2014) 15 *Obes Rev* 281; Kim D Raine and others “Restricting marketing to children: Consensus on policy interventions to address obesity” (2013) 34 *J Public Health Pol* 239; David Fisher “Move to ban fast-food advertising on city streets” *New Zealand Herald* (online ed, Auckland, 6 August 2012); Rebecca Smith “Ministers fail to ban junk food advertising before watershed despite childhood obesity problem” *The Telegraph* (online ed, London, 27 April 2014); contrast Editorial “Junk food advert ban no answer” *The Press* (online ed, Christchurch, 11 February 2014).

⁹ Simone Pettigrew and others “The effects of television and Internet food advertising on parents and children” (2013) 16 *Public Health Nutr* 2205 at 2205.

¹⁰ At 2205.

¹¹ At 2205.

¹² Pettigrew and others, above n 9; see also Maree Scully and others “Association between food marketing exposure and adolescents’ food choices and eating behaviors” (2012) 58 *Appetite* 1 at 4; contrast Pierre Chandon and Brian Wansink “Does food marketing need to make us fat?”

The debate on the effects of advertising on both children and adults is far from settled, with on-going argument regarding theoretical, evidential and methodological grounds.¹³ On the one hand, observational studies are only able to show correlation, while on the other, experiments that may demonstrate causality¹⁴ are open to accusations of low external validity.¹⁵ However some suggest that the convergence of findings in both types of studies strengthens the case for effects.¹⁶ Perhaps the most convincing study with respect to external validity comes from Quebec, which has a statutory ban on all child-specific advertising.¹⁷ The study compared the fast food consumption of French-speaking households to English-speaking households, finding a 13% lesser propensity to consume fast food amongst French households.¹⁸ The study made an evidence-based assumption that children from French-speaking households watch predominantly French programming, allowing the authors to exploit the fact that the ban does not apply to media originating from outside of Quebec (such as English language programming coming from other areas). Comparing French-speaking households in Quebec to French-speaking households in Ontario controlled for cultural differences between French and English families.

Not all commentators agree that the evidence establishes that advertising increases consumption of HFSS foods. Some argue that it is flawed or unrealistic to demand direct causal evidence in a public-health policy context, suggesting for example that continued high spending in HFSS food advertising should be accepted as evidence of

A review and solutions” (2012) 70 *Nutr Rev* 571 at 577, note that the former two papers were published after the latter.

¹³ Sonia Livingstone “Assessing the research base for the policy debate over the effects of food advertising to children” (2005) 24 *Int J Advert* 273 at 275.

¹⁴ See Jennifer L Harris, John A Bargh and Kelly D Brownell “Priming Effects of Television Food Advertising on Eating Behavior” (2009) 28 *Health Psychol* 404 at 409 who report a finding that children exposed to food advertising while watching TV in an experiment ate more of a provided snack than those who were not, with the only moderating factor being the preference for the snack offered, and at 415 suggest that the postulated mechanism for this may also apply to more subtle advertising such as logos on signs and websites.

¹⁵ See generally Livingstone, above n 13.

¹⁶ At 280.

¹⁷ Consumer Protection Act RSQ c P-40.1 1978, s 248.

¹⁸ Tirtha Dhar and Kathy Baylis “Fast-food consumption and the ban on advertising targeting children: the Quebec experience” (2011) 48 *J Marketing Res* 799 at 810.

its effect,¹⁹ while others argue that this advertising only affects brand preference, not overall consumption or category levels.²⁰ There is however a significant amount of evidence against this proposition²¹ and in fact the exact opposite argument is deployed by the industry on occasion – for example US food manufacturer General Mills in defence of advertising to children claims that:²²

...effective marketing of ... kid oriented yogurt products has essentially created a product category that did not formerly exist, encouraging kids to more often choose nutrient dense yogurt as a healthful snack.

Therefore it is submitted that claims advertising only affects brand preference should be regarded with some scepticism.²³

A further complicating factor is that parties to the debate are not always arguing the same point – for example Livingstone looked at two apparently opposing 2003 literature reviews regarding television (TV) advertising, one concluding that food promotion has an effect on children's preferences, purchase behaviour and consumption,²⁴ and the apparently opposing review concluding that there was no evidence that “television advertising has a *strong* influence on children's food consumption behaviour.”²⁵ A close reading of both these reviews shows an apparent

¹⁹ See B Swinburn, T Gill and S Kumanyika “Obesity prevention: a proposed framework for translating evidence into action” (2005) 6 *Obes Rev* 23 at 29; Janet Hoek “Marketing communications and obesity: a view from the dark side” (2005) 118 *N Z Med J* U1608.

²⁰ Lynne Eagle, Philip J Kitchen and Lawrence Rose “Defending brand advertising's share of voice: A mature market(s) perspective” (2005) 13 *Journal of Brand Management* 65 at 70.

²¹ Georgina Cairns and others “Systematic reviews of the evidence on the nature, extent and effects of food marketing to children A retrospective summary” (2013) 62 *Appetite* 209 at 214 concluded from a review of fifteen studies that the “overall weight of evidence was assessed as strong and indicated that food promotion does influence food choices at category and brand level.”

²² Letter from Janice L Marturano (Vice President - Public Responsibility and Deputy General Counsel of General Mills) to Donald Clark (Secretary of the Federal Trade Commission) regarding Interagency Working Group on Food Marketed to Children: FTC Project No P094513 Comments on Proposed Nutrition Principles and General Comments and Proposed Marketing Definitions (14 July 2011) at 34.

²³ Some commentators take a middle ground, for example Andrew SC Ehrenberg “Repetitive Advertising and the Consumer” (2000) 40 *J Advertising Res* 39 at 39 suggests that “[advertising's] extreme protagonists claim it has extraordinary powers and its severest critics believe them.”

²⁴ Livingstone, above n 13, at 276.

²⁵ At 276.

consensus of the view that television advertising has a modest effect on children's food choice.²⁶ The affirmative view was also echoed in a recent systematic review, which found "a convergence of evidence ... indicating marketing is [a] modifiable risk factor for children's health."²⁷ Even if the effect is moderate on an individual level, it may still substantially increase the number of obese children over an entire population.

As the above discussion illustrates the debate is far from settled. However, despite not being the primary causal factor for childhood obesity - and thus not presenting a "silver-bullet" solution - it seems that on the balance of probabilities food advertising has at least a modest direct or indirect effect²⁸ on children's consumption of food.

C. The Prevalence of HFSS advertising in New Zealand

No systematic analysis of HFSS advertising across multiple media appears to have been done in New Zealand. A 2005 study found that 70% of food advertisements on free to air TV channels in a morning and afternoon period that included children's programming were for HFSS foods.²⁹ Although HFSS advertising in this period has decreased due to self-regulation introduced in 2008,³⁰ a 2012 study found that there were between four and ten HFSS ads per hour on TV2 between five and eight pm, peaking at five pm. This study also looked at online advertising, observing the Facebook pages of New Zealand companies, with the top five posting between 29 and 57 separate product or brand advertisements in six weeks.³¹ Another recent study

²⁶ At 287.

²⁷ Cairns and others, above n 21, at 214.

²⁸ See Chandon and Wansink, above n 12, at 577 who raise the idea of indirect effects; contrast Lynne Eagle and others "Advertising and Children" (2005) 11 *Journal of Promotion Management* 175 at 180 who suggests that it is "extremely likely that [entrenched cultural, dietary and social rituals] are ... considerably stronger influences on dietary practices than advertising" this seems probable with regards to direct effects, but surely advertising is a contributor to these things.

²⁹ Nick Wilson and others "Marketing fat and sugar to children on New Zealand television" (2006) 42 *Prev Med* 96 at 5.

³⁰ See Part II(B)(1) and (2).

³¹ Gabrielle Jenkin "Food Marketing to NZ kids" (Big Food Symposium, University of Otago, Wellington, February 2014) at 7; For example Pizza Hut NZ "Pizza Hut NZ Facebook Page" (September 2014) Facebook <<https://www.facebook.com/pizzahutnz>> during the month of September, 2014, featured a promotional tie in with an animated film; including posts featuring toys, an online game, and photos of children dressed up as film characters.

looked at a sample of New Zealand magazines and found that 72% of food advertising in magazines aimed specifically at children was for HFSS foods.³²

³² Elizabeth No and others “Food references and marketing in popular magazines for children and adolescents in New Zealand A content analysis” (2014) 83 *Appetite* 75 at 79 HFSS food items were items classified as “occasional” by the Ministry of Health Food and Nutrition Guidelines for Children and Young People.

Part II. HFSS Advertising Regulation In New Zealand

A. The Regulatory Actors

As a prelude to analysis of the specific treatment of HFSS advertising to children in New Zealand, this section will give a brief descriptive account of New Zealand advertising regulation.

1. The Advertising Standards Authority

The main form of advertising regulation in New Zealand is self-regulation by the Advertising Standards Authority (ASA). It provides codes containing rules that advertisements in all media should comply with.³³ Although the ASA is not a statutory creation, its jurisdiction is recognised in the Broadcasting Standards Act 1989,³⁴ and its regulatory function has been affirmed by the Court of Appeal.³⁵

The ASA defines advertising widely:³⁶

“The word ‘advertisement’ is to be taken in its broadest sense to embrace any form of advertising and includes advertising which promotes the interest of any person, product or service, imparts information, educates, or advocates an idea, belief, political viewpoint or opportunity. The definition includes advertising in all traditional media and new media such as online advertising, including websites. Emails and SMS

³³ New Zealand Advertising Standards Authority “Home” (2014) Advertising Standards Authority <www.asa.co.nz>.

³⁴ Broadcasting Standards Act 1989, s 8(2) gives the Broadcasting Standards Authority a “backstop” jurisdiction to hear complaints about advertising where “neither the broadcaster nor the advertiser recognise ... the jurisdiction of the [ASCB]”.

³⁵ *Electoral Commission v Cameron* [1997] 2 NZLR 421 at 424 Gault J stated that “the Advertising Standards Complaints Board exercises a regulatory function by which it determines what advertising is or is not communicated to the public by substantially the whole of the media throughout the country.”

³⁶ New Zealand Advertising Standards Authority “Interpretation” (2014) Advertising Standards Authority <www.asa.co.nz> complaints have been heard under the food code from a variety of newer mediums such as; Facebook, see *Carl’s Jr Jim Beam Bourbon Burger Facebook Website 13/368* ASCB, 10 September 2013 and; YouTube, see *Carls Jr Jim Beam Bourbon Burger Infonews and Youtube Website 13/369* ASCB, 10 September 2013 with co-operation from the advertisers. The ASA has also provided guidance for advertisers regarding requirements for customer interaction on twitter and Facebook see New Zealand Advertising Standards Authority “ASA Guidance Note on Social Media” (October 2012) Advertising Standards Authority <www.asa.co.nz>.

messaging that are selling or promoting a product, service, idea or opportunity are also covered by the codes, as are neck labels or promotions attached to a product. Other examples include posters, pamphlets and billboards (whether stationary or mobile) and addressed or unaddressed mail.”

The ASA process is initiated by a complaint,³⁷ which is then assessed by the Chairperson,³⁸ who decides whether the Advertising Standards Complaint Board (ASCB) will hear the complaint. The ASCB is made up of five independent members (including the Chairperson) and four industry representatives nominated by the ASA. If there is no prima facie case, the Chairperson will rule that there are no grounds for the complaint to proceed (NGP). Winnowing complaints in this fashion is for economic reasons, and to speed up the consideration of serious claims, however the practice is debatable, as there is a risk serious complaints are also screened out.³⁹

If the complaint is accepted, the ASCB seeks comment from the advertiser, the agency, and the broadcaster (if relevant) within 14 days.⁴⁰ If the advertiser acknowledges the complaint and withdraws the advertisement, or provides more information showing the complainant misinterpreted or misheard the advertisement then the complaint will be considered settled, otherwise the complaint will either be upheld, in which case the advertiser, agency and media are requested to withdraw it, or not upheld, as decided by majority vote.⁴¹ There is a right of appeal to the Advertising Standards Complaints Appeal Board (ASCAB), which consists of two public representatives and one industry representative, on the grounds that new evidence is available, natural justice was not followed, or the decision was against the weight of the evidence.⁴² The ASA claims that

³⁷ New Zealand Advertising Standards Authority “Bugger...it’s ok! The case for advertising self-regulation” (2008) Advertising Standards Authority <www.asa.co.nz> at 4.

³⁸ At 3.

³⁹ Debra Harker and Glenn Wiggs “Three Generations of Advertising Self-Regulation: Learning from our Forefathers” (2000) 11 Marketing Bulletin 1 at 542.

⁴⁰ New Zealand Advertising Standards Authority, above n 37, at 4.

⁴¹ At 5.

⁴² New Zealand Advertising Standards Authority “Advertising Standards Complaints Appeals Board” (2014) Advertising Standards Authority <www.asa.co.nz>.

its requests are “invariably complied with”⁴³ and this appeared to be the case with all cases examined.⁴⁴

(a) The ASA Food Codes

The ASA has a Code for Advertising of Food (CAF) and a separate Children’s Code For Advertising Food (Children’s Code), which were implemented in August 2010.⁴⁵ The codes contain broad principles followed by non-exhaustive guidelines. For example,⁴⁶ the Children’s Code states that food advertisements should be prepared with a “high standard of social responsibility”,⁴⁷ and its guidelines include the direction that advertisements for HFSS foods should not encourage excessive consumption.⁴⁸

In addition to the ASA there are two other television self-regulating bodies specifically considering food advertising to children.

2. Television Self-Regulators

(a) CAB

The Commercial Approvals Bureau (CAB) is a body “supported by all the major television stations, advertisers and media industry associations” that vets all television advertising before it can be broadcast.⁴⁹ Although the CAB assesses commercials against the ASA’s current Codes of Practice and precedents set by past decisions, it does not guarantee that the advertisement will be found acceptable if a complaint is subsequently made to the ASCB.⁵⁰

⁴³ New Zealand Advertising Standards Authority, above n 33.

⁴⁴ The ASA does have some “teeth” to use in the event an advertiser refused to comply, as it can request it’s members - who represent broadcast, print and outdoor media in NZ, to refuse to carry the ad, see New Zealand Advertising Standards Authority, above n 37, at 5; see also New Zealand Advertising Standards Authority “Advertising Standards Authority Inc” (2014) Advertising Standards Authority <www.asa.co.nz> for a list of the ASA’s members.

⁴⁵ New Zealand Advertising Standards Authority “Code for Advertising of Food” (2010) Advertising Standards Authority <www.asa.co.nz>; New Zealand Advertising Standards Authority “Children’s Code For Advertising Food 2010” (2010) New Zealand Advertising Standards Authority <www.asa.co.nz> see appendices A and B for full reproductions.

⁴⁶ Children’s Code For Advertising Food 2010, Principle 1(f).

⁴⁷ Children’s Code For Advertising Food 2010, Principle 1.

⁴⁸ Children’s Code For Advertising Food 2010, Guideline 1(c).

⁴⁹ New Zealand Commercial Approvals Bureau “The CAB Story” (2011) Commercial Approvals <www.commercialapprovals.co.nz>.

⁵⁰ New Zealand Commercial Approvals Bureau, above n 52 state that “While there are no guarantees, commercials approved by CAB are less likely to have ASCB judgments held against

Food and beverage advertising appearing in programming “aimed at children aged 5-13 years old” requires a Children’s Food (CF) Classification, which must be specifically requested.⁵¹ Children’s programming times are defined by broadcasters.⁵²

(b) ThinkTV

ThinkTV, is a body “responsible for promoting the non-competitive interests of New Zealand’s free-to-air television industry” with all major Free-to-Air television broadcasters as members.⁵³ Its aim is to promote TV as an advertising medium,⁵⁴ ThinkTV uses the CAB classification system for food advertising⁵⁵ and also has a number of rules concerning advertising during children’s television programming which it says supplement the ASA codes.⁵⁶ Sponsorship of children’s programming is allowed but must be “limited and socially responsible”.⁵⁷

The CF classification system is not as restrictive as it appears at first glance, as it does not cover brand advertising,⁵⁸ or loyalty programmes not referring to specific food or beverages.⁵⁹ Further, the classification only covers standalone ads, not giveaways and sponsorship.⁶⁰ While this is somewhat mitigated by the fact that all these types of advertising could still be considered under the ASA Children’s Code, these factors significantly weaken the CF classification.

them than other media.”; CAB generally provides comment to the ASCB when a television ad is challenged, see for example *KFC Snack Boxes 13/303* ASCB, 10 September 2013.

⁵¹ Commercial Approvals Bureau “Classification System” (2011)

<www.commercialapprovals.co.nz> accessed 17 June 2014.

⁵² ThinkTV “The Children’s Television Policies: Advertising in Pre-School and School-Age Children’s Programming Times” (2011) ThinkTV <www.thinktv.co.nz>.

⁵³ ThinkTV “ThinkTV” (2011) ThinkTV <www.thinktv.co.nz>.

⁵⁴ ThinkTV, above n 56.

⁵⁵ ThinkTV “Advertising On Television: Getting it right for children” (2011) ThinkTV <www.thinktv.co.nz> at 4.

⁵⁶ At 2.

⁵⁷ At 3 Policy 7 - association with the programme can be promoted through other avenues but commercial acknowledgement while the program is on air must not be dominant. At 3 Policy 6, product giveaways are also allowed, with the product shown and its name referred to, but the host cannot endorse the product by emphasising its positive features.

⁵⁸ For example advertising just featuring McDonalds generally rather than a specific food product that can be purchased there.

⁵⁹ At 3 Policy 9. For example a buy ten get one free stamp card.

⁶⁰ At 3, Policies 6 and 7.

There are no laws specifically regulating advertising to children in New Zealand, although there are about 50 pieces of legislation that “impact on, or in some way restrict, advertising in New Zealand”⁶¹ including The Australia New Zealand Food Standards Code, which regulates labelling, information requirements and health claims regarding food products generally.⁶²

In summary, the ASA is the primary arbiter of advertising in all mediums in New Zealand, with ThinkTV and CAB providing supplementary controls for television advertising.

3. Public Health Bill 2007

One attempt was made to legislate to control food advertising to children. The Public Health Bill 2007 reached the select committee stage. It included provisions applicable to non-communicable diseases, and clearly anticipated obesity-related health consequences and the potential desirability of restrictions on HFSS food sales.⁶³ The Bill provided for the Director-General of the Ministry of Health to issue “codes of practice or guidelines”⁶⁴ including for “the ways in which specified goods, substances, or services are advertised, sponsored, or marketed (whether directly or indirectly)”.⁶⁵ Select committee amendments would have allowed the Minister of Health to recommend that regulations replace the guidelines⁶⁶ if reasonable progress in achieving the objectives of the guidelines was not made after two or more years.⁶⁷ These sections did not have bi-partisan support⁶⁸ and the Bill has not progressed any further since.

⁶¹ New Zealand Advertising Standards Authority, above n 37.

⁶² Australia New Zealand Food Standards Code, see Part 1.2 “Labelling and other information requirements”.

⁶³ (11 December 2007) 644 NZPD 13841, both Hon Tony Ryall in opposition at 13843 to and Hon Sue Kedgley at 13850 in support of the bill referred to its application to obesity and HFSS food.

⁶⁴ Public Health Bill 2007 (177-2), s 81.

⁶⁵ Section 83(2)(e), the Bill also provided incentives for compliance, with the Director-General having the ability to allow advertising of compliance by companies and to issue awards, see ss 85 and 86.

⁶⁶ Section 88C.

⁶⁷ Public Health Bill 2007 (177-2) (select committee report), s88A.

⁶⁸ (11 December 2007) 644 NZPD 13841 Hon Tony Ryall at 13843; Public Health Bill 2007 (177-2) (select committee report) at 12.

B. A Comparison of the Regulatory Actors

This section compares and contrasts the ways each of the regulators approaches food advertising to children.

1. Defining foods to be restricted or controlled

A first issue is how each regulator selects advertising of particular foods for scrutiny. Unless the advertising of *all* foods to children is to be restricted, regulation requires a system to define foods as healthy and less healthy. Categorising foods is not a simple task. Although it is straightforward to compare various models for strictness,⁶⁹ there is little evidence showing the impact on health-related outcomes of different systems.⁷⁰ While most systems agree at the outer ends of the spectrum (for example confectionery being classified as less healthy, while fruit is classified as healthy) there is less agreement regarding products such as baked beans and whole milk for example, and categorisation at this stage often appears to lack scientific support.⁷¹

(a) ThinkTV/CAB

As stated above, Food and beverage advertising appearing in programming “aimed at children aged 5-13 years old” requires a Children’s Food (CF) Classification. To achieve this, the product must be able to be classified as ‘Everyday’, ‘Sometimes’, or ‘Occasional’ under the Ministry of Health’s Nutrient Framework for Schools (MOHNFS). Daily consumption of a ‘sometimes’ food must not be promoted directly or indirectly, and all advertising of ‘occasional’ foods is forbidden.⁷² Exceptions can only be made after consultation with an independent nutritionist.⁷³

The CF classification deems certain foods such as confectionery, deep-fried foods, full-sugar drinks and sweetened energy drinks as occasional, and classes others by category (for example cheese, milk and bread) as ‘sometimes’ or ‘everyday’ based on one or

⁶⁹ See P Scarborough and others “How important is the choice of the nutrient profile model used to regulate broadcast advertising of foods to children? A comparison using a targeted data set” (2013) 67 *Eur J Clin Nutr* 815; Mike Rayner, Peter Scarborough and Asha Kaur “Nutrient profiling and the regulation of marketing to children Possibilities and pitfalls” (2013) 62 *Appetite* 232.

⁷⁰ Hawkes, above n 72, at 141.

⁷¹ Rayner, Scarborough and Kaur, above n 73, at 4.

⁷² ThinkTV, above n 58, at 4.

⁷³ Commercial Approvals Bureau “Advertising Food and Beverage Products to Children” (2011) Commercial Approvals Bureau <www.commercialapprovals.co.nz>.

more factors including maximum package size, sodium, fat or sugar levels.⁷⁴ If a food is classified as ‘Occasional’ it is further compared against the Food Standards Australia New Zealand (FSANZ) Nutrient Profiling Model (NPM), this is due to the fact that the MOHNFS is developed for schools and early childhood centres and that there are “complexities that surround putting in place nutrient criteria across the needs of children in a variety of settings which can differ to those in a school/childhood setting.” This approach allows for items such as spreads that are not classified in the MOHNFS.⁷⁵ The NPM is a more complex classification system used to determine whether health claims can be made: points are added for energy, saturated fat, sugar and sodium, and removed for protein, fruit and vegetable or fibre content. The final points score determines whether the food is “healthy” or “less healthy” overall, and thus whether a health claim can be made.⁷⁶ Although there is on-going debate about the optimal NPM system,⁷⁷ the FSANZ NPM is regarded as an example of international best practice.⁷⁸

This approach, by requiring assessment of the nutritional value of products advertised to children by reference to the Ministry of Health standards or by an independent nutritionist, represents a sensible attempt to protect children from an environment overly saturated with less healthy foods, while also encouraging food manufacturers to create nutritious food products that appeal to children. It has the positive features of using government rather than industry-led classification systems,⁷⁹ allowing for a wide variety of foods with the overall goals of keeping energy low and nutrients high, being

⁷⁴ See Ministry Of Health *Food and Beverage Classification System for Years 1-13: User Guide* (Learning Media Limited, Wellington, 2007).

⁷⁵ ThinkTV, above n 58, at 5.

⁷⁶ See Food Standards Australia New Zealand “Short guide for industry to the Nutrient Profiling Scoring Criterion (NPSC) in Standard 127 - Nutrition, Health and Related Claims” (April 2013) Food Standards Australia New Zealand <www.foodstandards.gov.au>.

⁷⁷ Rayner, Scarborough and Kaur, above n 73, at 235.

⁷⁸ B Swinburn, CH Dominick and S Vandevijvere *Benchmarking Food Environments: Experts’ Assessments of Policy Gaps and Priorities for the New Zealand Government* (University of Auckland, Auckland, 2014) at 31.

⁷⁹ H Brinsden and T Lobstein “Comparison of nutrient profiling schemes for restricting the marketing of food and drink to children” (2013) 8 *Pediatric Obesity* 325 at 336 note that industry led programmes are generally less effective at restricting advertising EDNP foods.

designed with children specifically in mind,⁸⁰ and being relatively easy to understand. The more complex FSANZ NPM is used to resolve debate about controversial foods.

(b) ASA

The Children's Code does not contain any broad advertising restrictions for any particular food in particular circumstances. However it does contain specific guidelines for "Treat Foods", defined as HFSS/EDNP food "intended for occasional consumption"⁸¹ and refers to the "current version" of the "MOH Food and Nutrition Guidelines for Healthy Children (aged 2-12 years): A background paper" (MOHFNG 1997).⁸² Guideline 1(d) of the Children's Code contains the broad instruction that advertisements should not undermine the MOHFNG. It is unclear what 'undermine' means exactly in this context. Interpreted narrowly it could refer to direct challenges of the MOHFNG, for example an ad that directly encouraged consumers to disregard it, or provided information contrary to its guidelines. However some argue that the sheer quantity of HFSS foods amongst foods advertised undermines healthy eating habits by "normalis[ing] [HFSS] food consumption patterns at a societal level."⁸³ It is likely a narrower interpretation would be taken, given that controlling total advertising quantity or constituency is not a role associated with the ASA. Guideline 1(d) was not discussed in any of the cases reviewed, likely due to the fact that there are more obvious guidelines covering cases of undermining (by the narrower definition) the MOHFNG such as encouragement of excessive consumption.⁸⁴

⁸⁰ Corinna Hawkes *Defining "Healthy" and "Unhealthy" Foods: An International Review* (2009) at 142 suggests that the questions "Who is a food healthy for?" and "In what contexts does a food become unhealthy?" will lead to a more productive debate given that this is the approach taken by most Governments, Industry and NGO's, and the lack of agreement on whether any foods are objectively "bad". Thus it is a positive feature that a considered set of guidelines exists with children's needs in mind.

⁸¹ Presumably the word "occasional" has been added for clarification rather than to imply that there are HFSS or EDNP foods not intended to be consumed occasionally.

⁸² The MOHFNG's contain comprehensive information about diet along with recommended daily intake values for energy and various nutrients.

⁸³ Pettigrew and others, above n 9, at 5 who argue that it "normalises [HFSS] food consumption patterns at a societal level"; see also Caroline Shaw "(Non)regulation of marketing of unhealthy food to children in New Zealand" (2009) 122 N Z Med J 1288 at 1288 who states that "[u]nder a codes and complaints system it is difficult to argue that a single advertisement is inconsistent with a healthy diet, but given that 70% of food advertising in "children's viewing hours is for food that is counter to healthy nutrition, television advertising does not support and promote healthy diets."

⁸⁴ Children's Code For Advertising Food 2010, Guideline 1(c).

Interestingly, since the release of the Children’s Code in 2010, the Food and Nutrition Guidelines for Healthy Children and Young People (aged 2–18 years) (MOHFNG 2012) have now superseded the MOHFNG 1997. The MOHFNG 2012 specifically acknowledges the wider food environment including marketing and its possible impact on diet.⁸⁵ Also, in comparison to the 1997 edition which emphasises “The principle of moderation” for treat foods while highlighting that occasional servings are acceptable as part of a balanced diet,⁸⁶ the 2012 edition now states that occasional means less than once a week.⁸⁷ This arguably strengthens the instruction in Guideline 1(d) that advertisements should not undermine the MOHFNG, for example it could be argued that HFSS ads should be highlighting this definition of occasional.

(c) Conclusion

The fact that nutrient profiling models vary internationally, and that methods of assessing which model works best to target childhood obesity are still in their infancy,⁸⁸ counts against using nutrient profiling to decide which foods to focus advertising restrictions on. However the MOHFNS catches the most obvious culprits,⁸⁹ (and therefore would be a useful model on which to base further advertising restrictions on TV or other media. Although further restrictions may lead to more challenges regarding foods classed as occasional by the MOHFNS, the more complex FSANZ NPM points system (discussed above) could be used to resolve such debates. As Handsley observe,⁹⁰ brand advertising featuring no mention of the product whatsoever can still get through here. This would still have the effect of increasing favourability towards a brand and therefore its food products.⁹¹ While one approach would be to require that a minimum proportion of food produced by the business has to meet the

⁸⁵ Ministry of Health *Food and Nutrition Guidelines for Healthy Children and Young People (aged 2–18 years)* (Ministry of Health, Wellington, 2012) at 94.

⁸⁶ Ministry of Health, above n 7, at 30.

⁸⁷ Ministry of Health, above n 89, at 15.

⁸⁸ Rayner, Scarborough and Kaur, above n 73, at 235.

⁸⁹ For example deep fried items, soft drinks and single items with high sugar or sodium levels.

⁹⁰ Elizabeth Handsley and others “Regulatory axes on food advertising to children on television” (2009) 6 Aust N Z Health Policy 1 at 3.

⁹¹ See for example McDonald’s “Happy Meal” (2014) Happy Meal <www.happymeal.co.nz> at 3 which features the McDonald’s logo, Happy Meal box imagery and various games, some of which include fruit, but no specific reference to any products. There is the option to sign up and collect points to encourage return visits; interestingly, the American counterpart McDonald’s “Happy Meal” (2014) Happy Meal <www.happymeal.com> features a small plain text note in the top right corner of the screen stating “Hey kids, this is advertising!”.

MOHFNS guidelines, this could get unwieldy. A more manageable alternative would be to restrict non-product specific brand advertising unless a MOHFNS item is featured; this seems to be occurring already.⁹²

2. Viewing Times

Another critical issue for advertising regulation is specifying the times when children are typically watching TV, with heightened regulation of content during these periods. Children's viewing time is also contentious. The ThinkTV advertising restrictions operate during "Children's Programming Times". Advertising is completely restricted during pre-school television programming, with various time periods between 6-10am and 2-3.30pm depending on channel and day of the week. There is also a second period defined as school age children's programming times where the CF classification is required – these times fall between 7am and midday, and 3.30 and 5pm depending on the day of the week and channel.⁹³ However, for the most part, these times do not actually correspond with times children are watching.

A 2008 report commissioned by the Broadcasting Standards Authority found that while weekday afternoons are the most popular time with 75% of 6-13 year olds watching on weekdays, 62-70% of 6-13 year olds were still watching television in the evening, with 31% still watching TV at 8.30pm Monday to Thursday, 51% on Friday, 48% on Saturday and 38% on Sunday. At 9.30pm this number drops to 7% on Monday to Thursday, 33% on Friday, 24% on Saturday and 15% on Sunday.⁹⁴ A separate study found that for children aged two years and under, 60% spent time in a room with a TV on for 1-3 hours, although 85% watched just children's programming.⁹⁵ Information for children aged 2-6 is not readily available, but it would seem reasonable to assume that their viewing habits fall somewhere in-between those of the two age groups studied.

⁹² Claire Hofer "Review of Food Advertisements for Compliance with the Advertising Standards Authority's Children's Code for Advertising Food" (December 2012) Food Industry Group <www.fig.org.nz> at 6, an industry commissioned report, cites five advertisements for McDonalds and Burger King kid's meals, all of which feature healthier items except one, which did not show any specific food or beverage items.

⁹³ ThinkTV, above n 55.

⁹⁴ Broadcasting Standards Authority *Seen and Heard: Children's Media Use, Exposure and Response* (Broadcasting Standards Authority, Wellington, 2008) at 20.

⁹⁵ SMB Morton and others *Growing Up in New Zealand: A longitudinal study of New Zealand children and their families Now we are Two: Describing our first 1000 days* (Growing Up in New Zealand, Auckland, 2014) at 45.

Therefore it appears that while the current restrictions have a significant shielding effect on HFSS advertising for the youngest viewers, HFSS advertising is still high during other times popular with 6-13 year old children.⁹⁶

The CAB's rule is that Adults Only ads can only be broadcast after 8.30pm (or during daytime adult programmes), in acknowledgment of the BSA "watershed".⁹⁷ It might be argued that parental supervision will help moderate any persuasiveness of HFSS advertising, and there is some evidence supporting this;⁹⁸ this argument could be used to justify allowing ads prior to 8:30 pm. However Pettigrew and others found that parents and children exposed to single television and internet advertisements depicting things such as family enjoyment, sporting heroes and tributes from people who enjoyed the product were likely to consider the product more appropriate to consume frequently compared to those viewing a static image. This finding casts doubt on effective parental mediation actually occurring.⁹⁹ The current designated children's programming times are also inconsistent with the CAB rules for ads requiring parental guidance which state they may only be broadcast after 7.00pm (or during news or daytime adult programmes).¹⁰⁰ The ASCAB¹⁰¹ itself has acknowledged that the classification ratings "are now out of step with current children's viewing patterns",¹⁰² and also, in a 2009 complaint, that the fact an ad would likely be viewed with parental supervision "would not necessarily mitigate the obvious appeal the advertisement would have to children."¹⁰³

⁹⁶ See Part I(C).

⁹⁷ Broadcasting Standards Authority Free-To-Air Television Code of Broadcasting Practice 2011, guideline 9(b).

⁹⁸ Pettigrew and others, above n 9, at 2210 cite multiple studies finding that "Active parental mediation involving communicating with children about the nature of advertising has been found to reduce such effects of advertising on children."

⁹⁹ At 2210.

¹⁰⁰ Commercial Approvals Bureau "Classification System" (2011) Commercial Approvals Bureau <www.commercialapprovals.co.nz>.

¹⁰¹ The ASA's appellate body, as discussed in Part II(A)(1).

¹⁰² Complaint 05/386 Appeal 06/002 as referred to in *Yoghurt Ice Cream 09/757 ASCB*, 27 January 2010 at 8 the ASCAB went on to say "In particular, the GXC 'General: except in programmes directly specifically at children' rating in reality does not limit children's exposure to ads with this rating. In fact the NZTVBC research quoted above shows that ads placed exclusively in GXC timeslots will reach more children than ads placed exclusively in programmes directed specifically at children."

¹⁰³ *Yoghurt Ice Cream 09/757 Appeal 10/015 ASCAB*, 2 June 2010 at 18.

Although a blanket ban on HFSS food advertising before 8:30pm would be the most effective option to reduce children's exposure to such advertising, no countries do this.¹⁰⁴ The most restrictive country appears to be Quebec, which restricts most HFSS advertising if the proportion of children in the audience is greater than 15%.¹⁰⁵ Given that setting such a low proportion of children is likely to have a similar effect in practice to a pre-8.30pm, it is submitted that this approach would be easier to manage.¹⁰⁶ However, this is likely to be commercially and politically unpalatable given the potential revenue loss.

Another question arises of whether it is logical having more stringent restrictions for TV than for other media. The fact this is still the dominant medium used by New Zealanders,¹⁰⁷ as well as the most studied in terms of effects of advertising may justify more specific restrictions on advertising targeting children on TV at present. However restrictions based on nutrition content should be extended to other mediums to ensure that the broadcasting industry is not being unfairly targeted and that restrictions do actually have their intended effect of a decrease in the overall exposure of children to HFSS advertising. This would likely require an increase in the age target in many circumstances;¹⁰⁸ other authors have already argued for this based on consistency with United Nations Convention on the Rights of the Child, which defines children as those under 18 years of age.¹⁰⁹

¹⁰⁴ Protecting Children from Junk Food Advertising (Broadcasting and Telecommunications Amendment) Bill 2011 (Cth), an Australian Commonwealth Bill, took this approach but did not get past the First Reading stage.

¹⁰⁵ See Part II(D)(1), note that the Quebec ban covers all advertising directed at children.

¹⁰⁶ Although if this approach were to be taken, including an exception to extend restrictions to events with a particularly high number of child viewers would be worth including.

¹⁰⁷ See Roy Morgan Research "Digital vs traditional media in New Zealand" (20 September 2013) Roy Morgan Research <www.roymorgan.com> who state that television use accounts for 35.5% of overall time spent with media in NZ for those 14+; and Broadcasting Standards Authority, above n 97, at 12 who state that 99% of children 6-13 said they used TV as opposed to 62% for internet.

¹⁰⁸ For example No and others, above n 32 found a high proportion of HFSS food ads in magazines favoured by 10-17 year olds, however magazines such as Girlfriend, Crème and Dolly, would likely argue that they target those over 14 years old.

¹⁰⁹ Louise Thornley, Louise Signal and George Thomson "Does industry regulation of food advertising protect child rights?" (2010) 20 Crit Public Health 25 at 28.

C. A Critical Analysis of the ASA and its Handling of Complaints

1. General Critique

(a) Low Number Of Complaints

Complaints were retrieved using the search tool on the ASA website;¹¹⁰ as it is not always obvious where the Children's Code will or will not be applied to food advertising complaints, complaints made under both the CAF and the Children's Code were retrieved.

Nine complaints between August 2010 and August 2014 involving children were found, five of which involved HFSS foods.¹¹¹ This is a considerable reduction from an analysis of a similar time period under the previous code (January 2007 to August 2010), which found 20 complaints relating to HFSS food products favoured by children.¹¹² This is perhaps surprising given that 2007 research showed widespread concern regarding food advertising to children among New Zealand parents and grandparents,¹¹³ and that the issue has continued to be a hot topic in academia and the media.¹¹⁴

The decrease in complaints likely represents a decline in the most obviously negative forms of advertising to children such as those encouraging repeated purchasing in a

¹¹⁰ New Zealand Advertising Standards Authority "Search by Code" (2014) New Zealand Advertising Standards Authority <www.asa.co.nz>.

¹¹¹ *McDonald's Family Game Night* ASCB Chairperson, 19 June 2014; *Cheerios Breakfast Cereal* 14/253 ASCB, 10 June 2014; *Apples* 13/485 ASCB Chairperson, 14 October 2013 (not an HFSS food); *Pork Meat* 13/243 ASCB, 14 June 2013 (not an HFSS food); *KFC Snack Boxes* 13/303, above n 53; *McDonald's Lamb Burger* 12/442 ASCB Chairperson, 27 September 2012; *Pork Meat* 13/243 (not an HFSS food); *Hell Pizza Lamb Shanks* 11/269 ASCB Chairperson, 24 May 2011 (not an HFSS food); *Burger King Bourbon Whopper* 11/161 ASCB, 10 May 2011; *School Canteen Poster* 10/704 ASCB, 1 March 2010.

¹¹² See Sharron Bowers, Louise Signal and Gabrielle Jenkin "Does Current Industry Self-Regulation Of Food Marketing In New Zealand Protect Children From Exposure To Unhealthy Food Advertising? Report Prepared For The Cancer Society Of New Zealand By The Health Promotion And Policy Research Unit, University Of Otago, Wellington" (2012) <www.otago.ac.nz>.

¹¹³ Phoenix Research "Survey of Public Opinions About Advertising Food to Children: Understanding Attitudes in New Zealand Research Report for Peak Group" (November 2007) Cancer Society of New Zealand <www.cancernz.org.nz> at 7.

¹¹⁴ See for example James Ihaka "Sports drinks: Should kids be using them?" *New Zealand Herald* (online ed, Auckland, 9 August 2014); Jeff Ritterman "Let's Ban Food and Beverage Ads! We Can Eat When We Are Hungry and Drink When We Are Thirsty Like Nature Intended" *Huffington Post* (online ed, New York, 20 May 2014); Smith, above n 8; Helen Dixon and others "Counter-Advertising May Reduce Parent's Susceptibility to Front-of-Package Promotions on Unhealthy Foods" (2014) [In Press] *J Nutr Educ Behav* 1.

limited timeframe.¹¹⁵ Advertisers are also likely being cautious with advertising methods.¹¹⁶ However viewing a low number of complaints as evidence of parental satisfaction with the system¹¹⁷ may be unwarranted, as there may have been a shift in advertising mediums used by HFSS food manufacturers resulting in less knowledge by parents of what children are actually exposed to.¹¹⁸ Recent New Zealand research showed that although most children's access to the Internet is likely in a location where supervision is possible,¹¹⁹ it is far more likely to be used alone than TV.¹²⁰

Further, ThinkTV itself points out that "Consumers become more resistant to advertising messages and consequently need to be targeted in more subtle and subliminal ways."¹²¹ Although a codes and complaints system remains appropriate for monitoring ads that cause offence or clearly mislead, it does not seem appropriate when attempting to deal with broader public health goals. It is submitted that these factors support the case for systematic monitoring of HFSS advertising across multiple time

¹¹⁵ For example ads such as those featured in *Bluebird Chippies "Rugby Superstars" Promotion 08/241 ASCB*, 10 June 2008 involving a promotion to encouraging the collection of 50 all black player cards with Bluebird chip packets over a limited time period.

¹¹⁶ This is possibly due to the fact that there is a certain amount of pressure for government regulation, see Dan Winfield "Food Fight" [2010] NZ Marketing Magazine 76 at 76 who states that "Bubbling away is also some pressure for government regulation. Everyone will want to avoid a repeat of the recent Law Commission report on the regulation of alcohol and alcohol advertising, which recommended severely curtailing alcohol advertising and saw little place for self regulation."

¹¹⁷ This has been the case in the past, Janet Hoek and Ninya Maubach "Self-Regulation, Marketing Communications and Childhood Obesity: A Critical Review from New Zealand" (2006) 39 Loy LA L Rev 139 cite the Communication Agencies Association of New Zealand interpreting low numbers of complaints to the ASA as evidence that "there is a high level of...compliance with the codes [and] ... a level of comfort among consumers of advertising that the promotion of products to children is being handled responsibly by advertisers, media and agencies."

¹¹⁸ See Jenkin, above n 31, at 7; Pettigrew and others, above n 9, at 2 who report a "migration of a growing proportion of advertising budgets to [internet advertising]"; World Health Organization *Set of recommendations on the marketing of foods and non-alcoholic beverages to children* (World Health Organization, Geneva, Switzerland, 2010) at 7 who note that television is "gradually being complemented by an increasingly multifaceted mix of marketing communications" including web sites; and Price Waterhouse Coopers New Zealand "New Zealand online space: Show me the money" (5 June 2013) Price Waterhouse Coopers <www.pwc.co.nz> regarding growth in New Zealand of online and mobile advertising.

¹¹⁹ Broadcasting Standards Authority, above n 103, at 35.

¹²⁰ report that 51% children aged 6-13 watch tv with an adult, and at 36, that only 34% use internet with an adult Broadcasting Standards Authority, above n 97, at 17.

¹²¹ ThinkTV "Television and online social media" (2011) ThinkTV <www.thinktv.co.nz>.

periods on television¹²² and multiple mediums, in order to ensure compliance with the codes, and assess the types of advertising being used.

(b) Definition of advertising

As discussed in Part II(A)(1), the ASA covers all media forms, and its definition of advertising is wide. The theoretically wide reach of the ASA based on this definition is unusual for a food advertising self-regulation system¹²³ and counts as a positive feature, as if any meaningful attempt is to be made to restrict advertising to children, it must cover multiple mediums – otherwise similarly problematic marketing will likely just occur in another medium.¹²⁴ Further the fact complaints regarding advertising from all sources are interpreted in one place makes the use of precedent easy and is conducive to ensuring consumers actually do complain about problematic ads, rather than being dissuaded by the complexity of the complaints process.

(c) Age range of the Children’s Code

This was addressed in the review leading to the implementation of the Children’s Code,¹²⁵ which noted the inconsistency with the United Nations Convention on the Rights of the Child (UNCROC) and also that some supported moving the upper age limit of the Children’s Code from 14 to 16 years of age.¹²⁶ The review committee ultimately recommended 14, in line with the BSA definition and the Children, Young Persons and their Families Act. Therefore the Children’s Code applies to children 14 and under although the CAF provides that advertisers are required to exercise “a particular duty of care” for food advertisements directed at young people aged 14-17

¹²² Shaw, above n 87, at 1288 observes that “at this point there is no systematic monitoring, so our understanding is based on a number of ad-hoc research projects, mainly looking at television advertising during advertising industry designated ‘children’s viewing hours’”, this still appears to be the case; While Claire Hofer, above n 95 performed an independent review of TV ads for compliance with the code, the threshold of ads screening when 35% or more of the audience was made up of children meant it was rather limited.

¹²³ S Galbraith-Emami and T Lobstein “The impact of initiatives to limit the advertising of food and beverage products to children: a systematic review” (2013) 14 *Obes Rev* 960 at 14 concludes from a worldwide review that “self-regulation does not generally include retail displays and in-store promotion, product design and formulation, or product labelling and packaging – and ... does not cover the use of licensed characters and tie-in characters from TV shows and cinema films being used on product packaging”.

¹²⁴ See for example No and others, above n 32.

¹²⁵ New Zealand Advertising Standards Authority “Final Report on the Review of the Code for Advertising to Children and the Code for Advertising of Food” (March 2010) New Zealand Advertising Standards Authority <www.asa.co.nz>.

¹²⁶ At 14 states that submissions to this effect were based on the other rights a person has at this age, for example to leave school and home.

years of age – although no specific guidelines flow from this, and it has not been successfully applied before.¹²⁷

Livingstone and Helsper reviewed the literature and suggest that, before five years of age, children do not consistently distinguish advertising from programs. By 7 or 8 years of age children can identify the persuasive intent of advertising but often need to be cued to do so. It is only after 12 years of age that children show a critical understanding of advertising and the intentions of its producers, even becoming sceptical or distrustful of advertising.¹²⁸ This argument could in theory support a complete advertising ban to children under 12 as it has done in Quebec, or short of this a ban on marketing to young children of products that discourage positive health outcomes. However, there is also a body of evidence that older children (up to 16 years of age) are likely to have their food choices significantly affected by advertising.¹²⁹ Some argue on a similar basis that due to the fact “most adolescents’ brains are not sufficiently developed to enable them to regularly inhibit impulsive behaviors and resist immediate gratification for longer-term rewards”, restrictions should also cover this age group.¹³⁰

While this is still an emerging area of research, Livingstone and Helsper try to explain the trends seen in their review by hypothesising that the *type* of advertising is relevant, and suggest that younger children with lower media literacy are more likely to be persuaded by advertising based on celebrities, jingles, colorful images and attractive physical features of a product. Older children with greater media literacy are more likely to be persuaded by advertising strategies based on argumentation,¹³¹ thus, the authors argue that for the former – such techniques should be restricted, and for the latter the focus should be on consumer awareness, provision of alternative food

¹²⁷ The “particular duty of care” was discussed in *Burger King Bourbon Whopper 11/161*, above n 113 where a minority thought that an alcohol flavoured sauce on a burger was in breach of the guideline as at 7 it “normalized alcohol use” for this age group.

¹²⁸ Sonia Livingstone and Ellen J Helsper “Does Advertising Literacy Mediate the Effects of Advertising on Children? A Critical Examination of Two Linked Research Literatures in Relation to Obesity and Food Choice” (2006) 56 J Commun 560 at 562.

¹²⁹ At 567, Table 1.

¹³⁰ Jennifer L Harris and Samantha K Graff “Protecting Young People From Junk Food Advertising: Implications of Psychological Research for First Amendment Law” (2012) 102 Am J Public Health 214 at 219.

¹³¹ Livingstone and Helsper, above n 130, at 576.

messages, and health information.¹³² Media literacy is often assumed to provide a ‘defense’ against the influence of advertising, there is however a lack of empirical support for this view.¹³³

(d) The Children’s Code contents

The Children’s Code begins with an introduction stating that the code applies to “All advertisements for food and beverages (“food”) that *influence* children, whether contained in children’s media or otherwise”.¹³⁴ This was changed from the 2006 Code for Advertising to Children (CAC) definition which referred to advertisements “*directed* at children”¹³⁵ (my emphasis). If this change meant that the fact an ad influenced a specific child had to be proven to make out a complaint, this would mean the code had narrower coverage, however as the ASA is not well equipped to undertake such an inquiry, it is more likely that this change was made to ensure advertising *likely to* influence children is captured whether specifically targeted at them or not. This appears to have been the intent of the review panel that developed the code.¹³⁶ Therefore the coverage of the code appears to have been broadened.

As stated in Part II(A)(1)(a) the guidelines are classed as non-exhaustive examples of each principle and it is emphasised that compliance is required with both the spirit and intentions of the code. This a positive inclusion as far as having scope to prevent advertisers from exploiting any loopholes, but perhaps with the trade off of less structured reasoning in general. There is then a statement that the ASCB¹³⁷ is “vested with discretion to ensure a commonsense outcome.” This is a concerning provision as surely a commonsense outcome should be implicit and this statement appears to have no other role than to provide license to deviate from the structure of the code.

¹³² At 577; Pettigrew and others, above n 9, at 55 also supports the hypothesis that certain types of advertising are likely to have particular appeal, finding that an advertisement featuring only children increased product appeal for children between 8-14 whereas ads featuring a lone adult, or adults and children did not.

¹³³ Livingstone and Helsper, above n 130, at 5.

¹³⁴ Children’s Code For Advertising Food 2010.

¹³⁵ New Zealand Advertising Standards Authority “Code for Advertising to Children (2006)” (April 2006) New Zealand Advertising Standards Authority <www.asa.co.nz>.

¹³⁶ New Zealand Advertising Standards Authority, above n 127, at 7 the panel state that they “debated wording that would accurately reflect the intent of the code to cover advertising that children may see and be influenced by, whether it was overtly targeted at them or not” and that “an advertisement for a product with significant appeal to children will have to take the new code into account”.

¹³⁷ The ASA complaints board.

Following this is a statement that advertisements should comply with laws and other industry codes, and an interpretation section followed by three principles.

2. Analysis of Complaints: Interpreting what counts as advertising to children

The ASA has previously been criticised for its interpretation of what counts as advertising to children.¹³⁸ A 2010 review of complaints made under the 2001 and 2006 versions of the codes found “partial, unjustified and inconsistent decision making.”¹³⁹ Bowers and others (Bowers) reviewed complaints made up until 2009, finding that four main criteria were used to determine whether to apply the children’s principles:¹⁴⁰

...1) whether the product was favoured by children; 2) whether the advertisement had appeal for children; 3) whether the intended target audience included children; and 4) whether the advertisement was likely to have been seen or heard by children.

It was found, however, that these criteria were applied inconsistently and that in some cases the view that programme times excluded children appeared to favour dismissal of complaints, even if it concerned a HFSS product that had appeal to children and was screened at viewing times popular with children. Further, upheld complaints had similar viewing times, target audiences, and appeal to children as dismissed complaints. There was also a consistent lack of information given regarding the exact screening times of advertisements.¹⁴¹

The following complaints were identified as raising similar issues:

(a) School Canteen Poster 10/704

10/704 concerned a poster distributed to school canteens containing information about nutrition, food handling and storage with a border containing twelve separate advertisements including, sugar-sweetened drinks¹⁴² and ice blocks.¹⁴³ “The advertiser

¹³⁸ Thornley, Signal and Thomson, above n 111, at 28.

¹³⁹ See Thornley, Signal and Thomson, above n 111, for example at 30 complaint 06/276 heard under the 2006 code chose not to apply the CAC on the grounds that the advertiser had not directed the advertisement to children, even though the star of the ad was a child, the product was animal-shaped sweets and the advertisement was screened at 6.50pm.

¹⁴⁰ Bowers, Signal and Jenkin, above n 114, at 14.

¹⁴¹ At 16.

¹⁴² *School Canteen Poster 10/704*, above n 113; note that Bowers, Signal and Jenkin, above n 114, at 17 identify the drink advertisements as “full sugar” however this appears to be incorrect as in 10/704 at 17 the complaints board noted that “the drinks shown had either a no or low sugar content”.

stated that the poster was not aimed at children, and the ASCB commented that the placement of the poster was at the discretion of the school.”¹⁴⁴ Bowers observed that when deciding whether the Children’s Code applied, the focus was on whether the advertisement was seen or heard by children, with no discussion of the poster’s appeal to children. While arguably the fact the poster was aimed at schools leads to a presumption it is aimed at children, it is submitted that the fact the poster was addressed to the school canteen manager and contained a sticker directing that it be displayed in the school canteen¹⁴⁵ would reasonably discharge this.

The procedure of deciding whether to apply the Children’s Code was also unclear with the Chair first “direct[ing] the Complaints Board to consider the advertisement with reference to Principles 1 and 2 of the [relevant codes including the Children’s Code]”¹⁴⁶ but then ruling that the Children’s Code did not apply. It is submitted that the full board should always be responsible for the decision of whether an ad is directed at children or not - otherwise the Chair essentially has a backdoor power to veto certain complaints in addition to being able to class them as NGP.¹⁴⁷

(b) *Burger King Bourbon Whopper 11/161*

This complaint considered a television advertisement for a burger with an alcohol-flavoured sauce. The ad announced that the product was the official burger of a car-racing event and showed an image of the burger with a voice description of its ingredients, followed by a car, and car sound effects. In considering whether the Children’s Code applied, the ASCB looked at the screening time, the imagery in the advertisement, the target market of the burger and also whether the product was favoured by children (although the ASCB only concluded that the fact the product had the word Junior in its name did not necessarily mean that the advertisement would

¹⁴³ *School Canteen Poster 10/704*, above n 113, at 1.

¹⁴⁴ Bowers, Signal and Jenkin, above n 114, at 17.

¹⁴⁵ *School Canteen Poster 10/704*, above n 113, at 3.

¹⁴⁶ At 13.

¹⁴⁷ As discussed in Part II(A)(1), if the ASA Chair thinks complaints are unmeritorious they can be classed as ‘No Grounds to Proceed’ and be dismissed without being heard by the complaints board. See generally regarding the ASA’s pre-vetting function Debra Harker, Glen Wiggs and Michael Harker “Responsive advertising regulation: A case study from New Zealand” (2005) 40 *Aust J Polit Sci* 541 at 553, who note that pre-vetting complaints is a departure from the literature on best practice for Advertising Self Regulation, and suggests that having more than one person involved in the vetting would increase the fairness of this process.

appeal to children).¹⁴⁸

Although a mere image of the product and description of its ingredients arguably doesn't have special appeal for children, a picture of a racing car with sound effects arguably does. This suggests a fairly conservative approach being taken by the ASA with regards to appeal to children. Further, it seems disingenuous to merely state that the fact the commercial was screened after 7pm puts it outside children's viewing time,¹⁴⁹ especially given the ASA's previous acknowledgment that this is not the case.¹⁵⁰ Even if the ASA's conclusion regarding the advertisement's appeal was correct, it is submitted that a better approach would have been to acknowledge that although many children were likely still exposed to the commercial, the lack of appeal to children was found to outweigh this factor. The complaint stated that the ad was seen at 7.50pm,¹⁵¹ however no further time was mentioned except that the ad was not shown before 7pm. Presumably this information is readily obtainable to the CAB and provision of exact times would perhaps help for a more reasoned approach to how much weight this factor is given.

(c) *Hell Pizza Lamb Shanks 11/269*

11/269 concerned a television advertisement for Hell Pizza lamb shanks, featuring a cartoon image of a lamb bouncing across a paddock with only three legs. The lamb was smiling and looking at the audience while a child's voice said: "Awww. Lamb shanks. Now available at Hell."¹⁵² The concern was that the ad would disturb young children.

This complaint was only considered by the Chair as it was ruled NGP. The Chair considered the target market was adults, not children and that therefore the Children's Code did not apply.¹⁵³ The format of the ad was not discussed; nevertheless the conclusion in this case still seems logical, as although the use of a child's voice and cartoon would likely initially attract a child's attention, the product is not one typically associated with children's tastes.

¹⁴⁸ *Burger King Bourbon Whopper 11/161*, above n 113, at 6.

¹⁴⁹ At 6.

¹⁵⁰ See Part II(B)(2).

¹⁵¹ *Burger King Bourbon Whopper 11/161*, above n 113, at 1.

¹⁵² *Hell Pizza Lamb Shanks 11/269*, above n 113, at 1.

¹⁵³ At 1.

(d) *McDonalds Lamb Burger 12/442*

12/442 involved a billboard advertisement for a McDonalds burger featuring a picture of the burger with the text “Mary had a little lamb Fries and a Coke” and below this “The serious lamb burger”.¹⁵⁴ Part of the complaint was that the ad targeted children and was for an HFSS product containing “over 20% of a child’s total energy intake for the day.”¹⁵⁵ It is submitted that the analysis (again, by the Chair only as the complaint was ruled NGP) is an improvement on *Burger King Bourbon Whopper*, as the Chair acknowledges that children may have seen and read it – rather than unrealistically dismissing this fact – but concludes this is outweighed by other factors such as the appeal of the advertisement, the appeal of the product and the target of the advertisement. This seems reasonable, given that although a children’s nursery rhyme was used, it was only in plain text beside a photo of the product.

(e) *KFC Snack Boxes 13/303*

13/303 involved a television advertisement for KFC “Snack Boxes” highlighting the fact that \$3 was enough to get “kids a whole meal” and stating that it is “only at KFC where a school holiday treat tastes so good.”¹⁵⁶ In deciding whether the Children’s Code applied, the ASCB looked at the times the advertisement aired – once again not noting the actual times but concluding that the advertisement was “not broadcast during programmes that targeted children.”¹⁵⁷

The appeal of the advertisement was considered, with the ASCB concluding that the reference to the \$3 price being no more than “a tip” and the lack of children’s imagery meant the ad was not “positioned in an attractive way to children.”¹⁵⁸ The target audience of the ad was also considered, with the conclusion that the encouragement to buy children the product meant that parents were the target.¹⁵⁹ While the screening time factor continues to be used inconsistently, it is positive that a range of factors was considered in this case.

¹⁵⁴ *McDonald’s Lamb Burger 12/442*, above n 118, at 1.

¹⁵⁵ At 1.

¹⁵⁶ *KFC Snack Boxes 13/303*, above n 53, at 1.

¹⁵⁷ At 2.

¹⁵⁸ At 2.

¹⁵⁹ At 2.

(f) *Pork Meat 13/243*

13/243 concerned a television advertisement for pork meat showing a child rejecting broad beans and offering them to a dog before hiding the unwanted beans in his pocket. A voiceover then encourages the consumption of pork meat as a source of certain nutrients found in broad beans. The relevant part of the complaint was that the advertisement “actively discourages” children from consuming vegetables by portraying them as undesirable.¹⁶⁰

Surprisingly the Children’s Code was not discussed at all, and in this case it is submitted that this led to a guideline being considered that did not correspond with the substance of the complaint. The Chair only looked at Guideline 1(e) of the CAF,¹⁶¹ which states “Benefits of foods for a nutritious diet should not be exaggerated and should not imply that a single food should replace a healthy diet or undermine the importance of consuming a variety of foods.” Given the complaint was not that the advertisement suggests that pork fulfils all nutritional needs, nor that pork is the only food that should be consumed, this guideline does not seem to be the most appropriate to be considered. Guideline 1(a) of the Children’s Code which states “Advertisements should not undermine the role of parents in educating children to have a balanced diet and be healthy individuals” would seem to be a better fit for the complaint. The complaint was ultimately dismissed. However, given the complaint regarded the advertisement’s influence on children – it is submitted that some discussion of whether the ad met the threshold for the Children’s Code was warranted.

(g) *Cheerios Breakfast Cereal 14/253*

14/253 concerned ‘Cheerios’ breakfast cereal – and involved a nutritionist highlighting that it contained “less than one teaspoon of sugar per serve”.¹⁶² The ASCB noted the complaint was being heard under the Children’s Code without providing reasoning for this other than the fact that the advertiser’s response had referred to this code and to the MOHNFS. The ASCB stated that they thought the CAF was more applicable given the product was a family cereal rather than a product *exclusively* targeted at children, but nonetheless decided to hear the complaint under both, the reasoning

¹⁶⁰ *Pork Meat 13/243*, above n 113, at 1.

¹⁶¹ At 2.

¹⁶² *Cheerios Breakfast Cereal 14/253*, above n 113, at 1.

being that the Children's Code had similar provisions to the relevant CAF guidelines.¹⁶³

While the complaint was still ultimately considered under the children's code, the reasoning is confusing. There is no requirement under the Children's Code that the product be *exclusively* targeted at children – the Children's Code expressly states that it applies to advertisements for foods that *influence* children. This also seems unfair to the advertiser – as the Children's Code (requiring a “high standard” of social responsibility under Principle 1) was considered for apparently no other reason than the fact it was similar to the CAF (which only requires a “due standard” of social responsibility under the equivalent Principle).

(h) *McDonald's Family Game Night 14/324*

This complaint concerned an advertisement for The Warehouse featuring a large image of a burger and other McDonald's products and stating “Free McDonald's Family Game Night. Spend \$24.99 or more on Hasbro* games and get a Family Value Meal Deal worth \$19.90 for free.”¹⁶⁴ The advertisement's format was not specified. The complaint did not point to any particular Principle or Guideline, but the essence was that it is unethical for HFSS food manufacturers to “blatantly target”¹⁶⁵ children through association with the purchase of toys.

Only the Chair considered this claim as it was ruled NGP. In deciding whether the children's code applied, the Chair stated that she disagreed with the complainant that the promotion was “exclusively aimed at children”, due to the promotion being titled “Family Game Night”.¹⁶⁶ As mentioned earlier, the fact that an advertisement is not *exclusively* aimed at children should not lead to the conclusion that the Children's Code is “not relevant”,¹⁶⁷ as it did in this case. Instead, the inquiry should be whether the advertisement influenced children. Neither the appeal of the product or the advertisement, or whether the advertisement was likely to have been seen or heard by children was discussed.

¹⁶³ At 2.

¹⁶⁴ *McDonald's Family Game Night*, above n 113, at 1.

¹⁶⁵ At 1.

¹⁶⁶ At 1.

¹⁶⁷ At 1.

The location of the ad was also not mentioned, promotions of this kind generally feature a sticker or some kind of advertising on or near the product featuring the special offer. In this case the products are board games likely found in the toy section of a store such as The Warehouse. Regardless of whether the product *exclusively* targeted children or not, if promoted in this way it would allow a business to get both the brand and imagery of HFSS products into a toy section of a shop on products heavily favoured by children. It could be argued this does not meet the “high standard of social responsibility” required by Principle 1 of the Children’s Code. Of course this argument would be weakened if the promotion were advertised by other means, the lack of information regarding this prevents a closer analysis.

It could also be argued that the ad would influence children to buy, or ask parents to buy, one board game over another in order to get the McDonald’s meal, but not to buy or request McDonald’s products directly. This would still be a potential breach of guideline 1(b) of the Children’s Code, which the chairperson appeared to acknowledge,¹⁶⁸ however more substantive analysis did not take place.

(i) Summary and Conclusion

Overall the ASCB is still inconsistent with its reasoning when deciding whether to apply the Children’s Code. The viewing time argument was again applied arbitrarily in *Burger King Bourbon Whopper* and *KFC Snack Boxes*. In *Pork Meat*, although the complaint concerned the possible effect of the ad on children, the Children’s Code was not addressed at all, resulting in the Chair only considering a CAF guideline that did not correspond with the substance of the complaint. There continued to be little elaboration of exact screening times, and in *McDonald’s Family Game Night* the medium of the advertisement was not specified. It is submitted that identification of all screening times of advertisements (and mediums if not television ads) would allow for better use of precedent, and more logical consideration of whether the Children’s Code should apply. For example, the later the ad, the less likely children will see it and therefore more elements that could potentially appeal to children could be included without the inference being drawn that the ad will in fact influence children. Further

¹⁶⁸ At 2 the Chairman said that a “family meal deal promotion with the purchase of a family board game was a very different type of offer than one that the Complainant interpreted as ‘combining toys with high fat foods’.”

codification of the criteria used to determine whether an advertisement influences children could assist with this.

In *Cheerios Breakfast Cereal*, the ASCB took the view that the fact that the product did not *exclusively* target children meant the Children's Code should not be considered, similarly, in *McDonald's Family Game Night*, the fact the advertisement was not *exclusively* aimed at children was used to draw the conclusion that the Children's Code was not relevant to the complaint. This appears to be a misinterpretation of the Children's Code, which is worded more widely than the 2006 CAC and refers to advertisements *influencing* children rather than those *directed at* children.¹⁶⁹ It is submitted that the ASCB should take care when applying this test not to tighten the criteria.

3. Analysis of complaints: Use of precedent

(a) School Canteen Poster comparison with Energy Drink Poster 10/284

Bowers observes that *School Canteen Poster* appears to be inconsistent with a previous decision under the 2006 CAF¹⁷⁰ (which also contained specific principles relating to children). *Energy Drink Poster* concerned a poster that the advertiser stated was not aimed at children. In this case the ASCB found that the poster was directed at children (and thus considered under the children-specific principles) as well as adults, due to the fact that "the advertisement would be visible to everyone on the premises, including children".¹⁷¹ However the ASCAB allowed an appeal against the finding that the poster was directed at children as "there was nothing specific in the imagery or wording of the poster that was directly aimed at children".¹⁷² The result would perhaps be different under the new code, given the change in the scope of the Children's Code from advertisements directed at children to advertisements that influence children. However even if the ASCAB had classified the poster in *School Canteen Poster* as directed at children, it could be distinguished from *Energy Drink Poster* by the fact that *School Canteen Poster* concerned a poster with nutrition and food safety information as its

¹⁶⁹ See discussion in Part II(B)(3)(d).

¹⁷⁰ Bowers, Signal and Jenkin, above n 114, at 17; *Energy Drink Poster 10/284* ASCB, 10 August 2010, the complaint raised issues under Principle 2 of the CAF 2006, which refers to general social responsibility, and Principle 3, which refers to a high standard of social responsibility for advertisements directed at children.

¹⁷¹ *Energy Drink Poster 10/284*, above n 171, at 4.

¹⁷² *Energy Drink Poster 10/284 Appeal 10/025* ASCAB, 21 September 2010 at 10.

primary feature and came with a direction that it be displayed in the school canteen,¹⁷³ as opposed to a general retail space. Thus, it is submitted that while *Energy Drink Poster* is not inconsistent with the final decision in *School Canteen Poster*, it may have been worth mentioning considering that it featured the ASA's appellate body considering the same media.

(b) *Pork Meat* comparison with *Yoghurt Ice Cream 09/757*

As discussed above, *Pork Meat* concerned a television advertisement for pork meat showing a child rejecting broad beans. This result can be contrasted with complaint *Yoghurt Ice Cream*, considered under the 2006 Code for Advertising to Children (CAC) and CAF. The complaint concerned a television ad for yoghurt ice cream involving children being presented with various ideas to make vegetables and whole-grain bread taste better and rejecting each of them. The children are then asked if yoghurt would be better if blended with ice cream to which they reply 'yes'. In deciding whether the CAC applied, the ASCB took into account that use of the words "Hey Kids" would likely draw the attention of children, imagery in the ad such as an asparagus smiley face and animated characters made from wholegrain toast, and the interaction of the narrator with a younger child.¹⁷⁴ Interestingly, neither the ASCB nor the ASCAB thought Guideline 2(k) of the CAC applied (essentially identical to Guideline 1(a) of the Children's Code except it also includes social responsibility as well as health).¹⁷⁵ However the ASCB ruled that the advertisement did not meet the high standard of social responsibility required by Principle 2 of the CAC as:¹⁷⁶

...a likely consumer interpretation of the advertisement was that it positioned asparagus, broccoli and whole grain toast in particular, and 'plain' yoghurt, as unattractive food options for children while suggesting that yoghurt with ice cream added tasted better and was an easy food option children would enjoy.

¹⁷³ *School Canteen Poster 10/704*, above n 113, at 2.

¹⁷⁴ *Yoghurt Ice Cream 09/757*, above n 104, at 8.

¹⁷⁵ Guideline 1(a) of the Children's Code states, "Advertisements should not undermine the role of parents in educating children to have a balanced diet and be healthy individuals." Guideline 2(k) of the CAC stated, "Advertisements should not undermine the role of parents in educating children to be healthy and socially responsible individuals."

¹⁷⁶ *Yoghurt Ice Cream 09/757*, above n 104, at 9; note that Principle 2 of the CAC stated, "Advertisements should observe a high standard of social responsibility" and Principle 1 of the Children's Code states that "All advertisements should be prepared with and observe a high standard of social responsibility to consumers and to society."

The ASCB also found that Principle 3 of the CAC (identical to Principle 2 of the Children’s Code in all relevant respects)¹⁷⁷ had been breached, as the ad was likely to:¹⁷⁸

mislead children and exploit their lack of knowledge, by suggesting that food items such as asparagus, broccoli, whole grain toast and yoghurt, had a taste that children would not like, which amounted to a negative stereotype about a range of everyday food choices.

The ASCAB decided whether to apply the CAC by taking into account the words “Hey Kids”, the fact that the only visible character in the advertisement was a young child, and the various childlike imagery used in the ad.¹⁷⁹ The breach of the high standard of social responsibility required by the CAC was upheld due to the fact that “a message communicated through this advertisement was that asparagus, broccoli and whole grain toast did not taste good.”¹⁸⁰

Although the ASCAB accepted that the ad was “intended to demonstrate in a light hearted and humorous way the lengths parents will go to try and get children to eat everyday foods”,¹⁸¹ they emphasised the need to consider the ad from the point of view of the consumer, and highlighted the portrayal of multiple negative responses of a child to multiple healthy food items, juxtaposed with a positive response to an ice-cream product.¹⁸²

There are some distinguishing factors. In *Yoghurt Ice Cream* vegetables were juxtaposed with an ice cream product (albeit a low fat version fitting the ‘Sometimes’

¹⁷⁷ Principle 3 of the CAC stated, “Advertisements should not by implication, omission, ambiguity or exaggerated claim mislead or deceive or be likely to mislead or deceive children, abuse the trust of or exploit the lack of knowledge of children, exploit the superstitious or without justifiable reason play on fear.” Principle 2 of the Children’s Code states, “Advertisements should not by implication, omission, ambiguity or exaggerated claim mislead or deceive or be likely to mislead or deceive children, abuse the trust of or exploit their lack of knowledge or without reason play on fear.”

¹⁷⁸ *Yoghurt Ice Cream 09/757*, above n 104, at 9.

¹⁷⁹ *Yoghurt Ice Cream 09/757 Appeal 10/015*, above n 105, at 17.

¹⁸⁰ At 19.

¹⁸¹ At 18.

¹⁸² At 19.

category of the MOHNFS)¹⁸³ as opposed to a legume being juxtaposed with a plain meat product (both classed in the same ‘Everyday’ category under the MOHNFS)¹⁸⁴, the phrase “Hey Kids” was used (although the narrator was talking to the kids in the ad, not the viewer), childlike imagery was used to a greater extent than in *Pork Meat*, and the ultimate point was that pork is a good source of some of the same key nutrients as broad beans. Nevertheless, it is submitted that there are still enough similarities that *Yoghurt Ice Cream* should have been considered.

(c) *Hell Lamb Shanks 11/269*

Notably, precedent was used in this complaint. A previous ruling from 2009 concerning an identical version of the ad, but with a different voiceover¹⁸⁵ was used as to decide this complaint.

(d) Summary and Conclusion

School Canteen Poster and *Pork Meat* appear to be inconsistent with past rulings, however a comparison of the cases revealed arguably distinguishing features. The ASA states that only “some decisions set precedents”,¹⁸⁶ but while this approach may be justified for complaints based on offense, due to the need to constantly take into account changing community standards, it is arguably less justifiable when the ASA is attempting to respond to a public health issue.¹⁸⁷ Another reason for this approach may be to keep costs down, however, given the low number of complaints in this area, precedent use would not be onerous, and may even help to increase efficiency in some cases as well as providing a more informative body of cases that industry can learn from,¹⁸⁸ and help ensure consistency in the ASCB’s reasoning.

¹⁸³ *Yoghurt Ice Cream 09/757*, above n 104, at 6.

¹⁸⁴ Ministry Of Health, above n 78, at 14.

¹⁸⁵ *Hell Pizza Lamb Shanks 11/269*, above n 113, at 2.

¹⁸⁶ New Zealand Advertising Standards Authority “Bugger...it’s ok! The case for advertising self-regulation” (2008) Advertising Standards Authority <www.asa.co.nz> at 16.

¹⁸⁷ See also Samuel Buchan “Censoring God: The Scope and Limits of Religious Advertising in New Zealand” (LLB (Hons) Dissertation, University of Otago, 2012) at 28 who argues on a more general note that given the ASA’s objective of regulating the industry “it seems obligatory that this regulation must embody some of the components of the more formal types of regulation it is trying to mimic.”

¹⁸⁸ See Harker, Wiggs and Harker, above n 148, at 552 who observe that complaint determination decisions are widely published, and that one of the reasons for this is to educate the industry and ensure precedent is understood.

4. Targeting parents vs. children

Two issues become apparent here, the first is the risk that instead of telling children “ask your parents for this”, advertisements will address parents directly, but in a way children are likely to also pick up on. The second is that restrictions will encourage advertisers to pressure parents more directly. With regards to the former, a distinction between an advertisement directly addressing children about a product intended for them, and one telling parents that a product is suitable for a “school holiday treat” and “a whole meal for kids”, as *KFC Snack Box* did, seems finely balanced. The fact that the ad stated that the cost of the meal was no more than a tip, a reference kids are unlikely to understand, arguably does not neutralise the fact that kids are likely to pick up on a message essentially saying “it’s the school holidays, buy your kids this product”.¹⁸⁹

With regards to the latter point, it is suggested that the strongest justifications for advertising restriction comes from the fact that it is arguably misleading to children who lack the cognitive ability to be sceptical of advertising,¹⁹⁰ therefore attempts to restrict advertising of HFSS food to adults are on weaker ground. However care should be taken that efforts to encourage child consumption of HFSS foods are not just completely refocused on adults. The fact the KFC meal in *KFC Snack Box* was classed as a “treat” can go either way – on the one hand it can be interpreted as emphasis that it is for occasional consumption only, on the other it could be perceived as reinforcing the idea that HFSS foods are an ideal way to show children love and affection, some argue this societal norm has led to HFSS food becoming a daily occurrence for many, as well as sending mixed messages about what occasional consumption really means.¹⁹¹ With regards to this point, the focus should be on ensuring there is some guidance to how often HFSS products should be consumed, rather than nebulous terms such as “moderation” or “treat”.¹⁹²

¹⁸⁹ *KFC Snack Boxes 13/303*, above n 53, at 2.

¹⁹⁰ See discussion in Part II(B)(3)(c).

¹⁹¹ While, as discussed in Part II(B)(1)(b), the MOHFNG now states that occasional means less than once a week, this is not a fact that is regularly emphasised.

¹⁹² A related issue is ensuring that nutritional claims do not give a misleading impression of a product’s overall nutritional value, see Anandita Devi and others “Nutritional quality, labelling and promotion of breakfast cereals on the New Zealand market” (2014) 81 *Appetite* 253 who criticise the fact that the FSANZ NPM restricts health claims such as “calcium - good for strong bones” but not nutrition claims such as “high in fibre” on products classed as less healthy. The

5. Analysis of complaints: Negative messages towards healthy items

The use of negative messages towards healthy food items in *Pork Meat* also raises the question of whether a negative message towards a healthy item such as a fruit or vegetable is a problem in itself, or only when made in juxtaposition to a less healthy product. The relevant sections of the Children's Code¹⁹³ appear to be consistent with restriction of negative messages towards healthy items. Further, evidence suggests that negative peer modelling will reduce the chances a child (aged 3 to 7 years in the study) will try a food they haven't tried before and that it may be hard (although not impossible) to reverse this with positive peer modelling.¹⁹⁴ Therefore it is submitted that negative messages involving core food items and featuring children should be treated with caution, even when couched in the context of a humorous joke to adults, and that the ASCB perhaps erred in applying the "spirit and intention" of Principle 1¹⁹⁵ and Guideline 1(a) of the Children's Code in this case.

D. Overseas Approaches

Approaches to regulation of food advertising influencing children vary worldwide – from a complete ban of all forms of advertising that targets children (Quebec) to self-regulation either approved by, encouraged by, or entirely independent from government (being administered by a separate organisation or a company itself).¹⁹⁶

1. Quebec (complete ban)

In 1980, Section 248 of the Quebec Consumer Protection Act banned "the use of commercial advertising directed at persons under thirteen years of age."¹⁹⁷ It was the

authors observe that many less healthy children's cereals in New Zealand make nutrition claims; given that Helen Dixon and others "Parent's responses to nutrient claims and sports celebrity endorsements on energy-dense and nutrient-poor foods: an experimental study" (2011) 14 Public Health Nutr 1071 found that parents tend to use nutrition claims when deciding what to purchase rather than looking at the products full nutrition information panel, there is a strong argument that the FSANZ NPM should also cover nutrition claims.

¹⁹³ For example Guideline 1(a) "Advertisements should not undermine the role of parents in educating children to have a balanced diet and be healthy individuals."

¹⁹⁴ Janette Greenhalgh and others "Positive and negative peer modelling effects on young children's consumption of novel blue foods" (2009) 52 Appetite 646 at 651.

¹⁹⁵ Principle 1 "All advertisements should be prepared with and observe a high standard of social responsibility to consumers and to society."

¹⁹⁶ See generally Galbraith-Emami and Lobstein, above n 125.

¹⁹⁷ Consumer Protection Act RSQ c P-40.1 1978, s 248.

first jurisdiction to do so.¹⁹⁸ Interestingly, this occurred prior to worldwide interest in the obesity epidemic.¹⁹⁹ The primary justification for the legislation was the fact that children are “particularly vulnerable to the techniques of seduction and manipulation abundant in advertising”,²⁰⁰ although tooth decay caused by sugary foods was also a concern.²⁰¹

Section 249 sets out the test for determining what counts as “directed at persons under thirteen years of age”:

account must be taken of the context of its presentation, and in particular of

- (a) the nature and intended purpose of the goods advertised;
- (b) the manner of presenting such advertisement;
- (c) the time and place it is shown.

The fact that an advertisement is contained in printed matter or broadcast during air time intended for persons over thirteen years of age or for mixed audiences, does not create a presumption that the advertisement is not directed at persons under thirteen years of age. The ban applies to both those who “design, distribute, publish or broadcast the advertisement” and those that request these services.²⁰² It applies to all formats, and an interpretation guide produced by the Quebec Office of Consumer Protection advises that interpretation will move to keep up with “new formats and media that emerge as a result of changes in advertising practices and technologies”.²⁰³

¹⁹⁸ Hawkes, above n 199, at 20.

¹⁹⁹ World Health Organisation “Controlling the global obesity epidemic” (2014) World Health Organisation <www.who.int> states that “WHO began sounding the alarm [regarding the global obesity epidemic] in the 1990s”.

²⁰⁰ The Attorney General of Quebec v Irwin Toy Limited [1989] 1 SCR 927 at 987 (this was the reasoning used to justify the restriction in an appeal that it the Canadian Bill of Rights).

²⁰¹ Bill Jeffery “The Supreme Court of Canada’s Appraisal of the 1980 Ban on Advertising to Children in Quebec: Implications for ‘Misleading’ Advertising Elsewhere” (2006) 39 Loy LA L Rev 237 at 239.

²⁰² Quebec 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” (10 September 2012) Quebec Office De La Protection Du Consommateur <www.opc.gouv.qc.ca> at 2.

²⁰³ At 3.

When considering whether an ad is directed at children, all three factors in s 249 are considered. The requirements under ss 249(b) and (c) are dependent on s 249(a): if a product is considered intended specifically for children (candy is given as an example) or particularly appealing to children but not specifically intended for them (fast food is given as an example for this category) then it “must not be designed in a way that appeals to children” or “be broadcast or distributed in a place where or at a time when children are normally reached”.²⁰⁴ In interpreting the manner of presentation under s 249(b), factors such as language, subject matter, child characters, music and use of “spectacular media techniques” such as sound, colour, special effects, cartoons or 3D animation are taken into account.²⁰⁵

For television, a percentage test is used to assist when determining whether an ad is directed at children: if children make up over 15% of the audience, products intended specifically for children are prohibited, while products with “strong appeal” for children (such as fast food) are prohibited if the underlying message is designed to “arouse the interest” of children; if the audience contains less than 15% children, advertisements for products with “strong appeal” are allowed, provided that the underlying message is not designed to arouse the interest of children.²⁰⁶ These two tests are essentially the same, but presumably are written in both negative and positive form to emphasise that the test will be applied more strictly when the audience contains a higher percentage of children. The allowable percentage of child viewers can be reduced if there are a particularly large number of viewers (such as for special events).

Inexplicably, s 88 of the Regulation Respecting the Application of the Consumer Protection Act 1981 exempts advertising directed at children in children’s magazines, although s 91 dictates that the advertisement must comply with other requirements (for example, not portraying negative behaviour).²⁰⁷ The same applies to store windows, displays, containers, packaging and labels,²⁰⁸ with the added proviso that they must not “serve as an advertising format to advertise other products aimed at children in an

²⁰⁴ At 9.

²⁰⁵ At 6.

²⁰⁶ At 26.

²⁰⁷ Regulation Respecting the Application of the Consumer Protection Act 1981, s 91(f) and (k); The requirements are similar to those found in the Children’s code, Guidelines 1(c) and 1(e).

²⁰⁸ Regulation Respecting the Application of the Consumer Protection Act 1981, ss 90 and 91.

attempt to circumvent the ban”²⁰⁹ or to encourage pester power.²¹⁰ Event sponsorship by name is also allowed, however a logo or mascot cannot be used and the brand’s message cannot be presented in a manner that would “arouse the interest of children.”²¹¹

As stated in Part I(B), a 2011 study found that the ban decreased propensity to consume fast food by 13%, with primarily French-speaking children affected,²¹² however a key limitation is that only one food category was assessed, so it is unclear if expenditure was being redirected to another category.²¹³ The authors acknowledge that although the precise effect on obesity levels is difficult to assess without further knowledge of food/lifestyle habits, Quebec has one of the lowest childhood obesity rates in Canada despite also having one of the most sedentary lifestyles.²¹⁴

(a) Comparison to ASA New Zealand Code

Some parts of the Quebec regulations seem weaker than the ASA Code; in-store and on-packet advertising is allowed to “portray a person or character known to children to promote goods or services”²¹⁵ without limitation, while the ASA code specifies that characters “should not be used to endorse [HFSS food].”²¹⁶

At first glance, the efficacy of Quebec’s ban seems largely dependent on the interpretation of what is directed at children, and it is potentially subject to similar criticisms as those addressed to the ASA.²¹⁷ It is submitted, however, that the considerable guidance provided could be borrowed for future versions of the Children’s Code to improve the consistency of reasoning regarding what counts as

²⁰⁹ The scope of this provision is unclear, for example does it just restrict advertising of a whole different product line such as chocolate bar pictures on a cereal box? Other products in the same line? Or repeat purchases, for example a discount voucher for the next box?

²¹⁰ Quebec Office De La Protection Du Consommateur, above n 205, at 15.

²¹¹ At 11.

²¹² Dhar and Baylis, above n 18, at 26.

²¹³ If for example, confectionary consumption, was increasing while fast food consumption was decreasing the ban could in fact have negative health effects.

²¹⁴ Dhar and Baylis, above n 18, at 27.

²¹⁵ The Regulation Respecting the Application of the Consumer Protection Act 1981, ss 90 and 91.

²¹⁶ Code for Advertising to Children 2010, Guideline 3(b).

²¹⁷ See Bowers, Signal and Jenkin, above n 114, at 17.

children's food advertising. One advantage New Zealand would have over Quebec if implementing further restrictions is that it does not receive broadcasting from other jurisdictions, which inhibits the effect of the ban on English-speaking children in Quebec, as their preferred TV viewing comes from outside the area.²¹⁸

It is also worth noting that some have argued that, based on the reasoning of the statutory ban on advertising to children in Quebec, existing statutory prohibitions on misleading advertising in other jurisdictions could be interpreted in a manner that includes a statutory ban on advertising to children.²¹⁹

²¹⁸ Monique Potvin Kent, Lise Dubois and Alissa Wanless "Food marketing on children's television in two different policy environments" (2011) 6 *Pediatr Obes* e433 at e439.

²¹⁹ See Jeffery, above n 204.

Part III. Rights Implications and Legitimacy of Advertising Restrictions

As seen above, it is clear that placing further restrictions (such as a pre-8.30pm ban) on HFSS food advertising influencing children is likely to also affect the amount of HFSS advertising to which the general population is exposed. This section puts aside the question of the evidence base for advertising restrictions and the efficacy of the current approach to ask whether there are overriding reasons that advertising restrictions should be avoided, regardless of potential public health benefits.

A. Freedom of Expression

Section 14 of the New Zealand Bill of Rights Act 1990 (NZBORA) states that “Everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form.” If the Government imposed further restrictions on advertising, it could be argued to breach the NZBORA.²²⁰ Or, if the ASA were to adopt further restrictions as suggested in Part II, it could also perhaps be challenged on the basis of the NZBORA – if for example an individual advertiser objected to a ruling by the ASA that they could not broadcast an advertisement.

1. Is the ASA subject to the NZBORA?

Section 3(b) of the NZBORA states that the Act applies to acts done “by any person or body in the performance of any public function, power, or duty conferred or imposed on that person or body by or pursuant to law.”

The Ministry of Justice Guidelines tentatively assume that the ASA is performing a public function, listing it as an example of an organisation to which the NZBORA may apply.²²¹ Further support for this view comes from the Court of Appeal who held that

²²⁰ Section 3(a) of the New Zealand Bill of Rights Act 1990 states that it applies to acts done “by the legislative, executive, or judicial branches of the Government of New Zealand”.

²²¹ Ministry of Justice “PART I: An Introduction to the Bill of Rights Act” (November 2004) Ministry of Justice <www.justice.govt.nz> state that “organisations operating in different spheres of activity may be subject to the Bill of Rights Act as a result of applying the public function test. Examples of these activities may include (but are not limited to): ...The administration of a public welfare regulatory framework [by] organisations that regulate the media”. The ASA is included in its list of examples.

“The [ASCB] in carrying out its public regulatory role, though in accordance with powers conferred ... by a private organisation, must be regarded as exercising public power.”²²² Given this judicial recognition of the ASA’s function it is submitted that the ASA would meet the public function limb of the 3(b) test.

The Ministry of Justice Guidelines state that whether a public function, power or duty is conferred or imposed by or pursuant to law has had little consideration by courts, but note that “it is clear that section 3(b) applies in respect of a broader range of activities than just those imposed by legislation [, such as] where a body voluntarily assumes obligations under a set of legal rules as well as an organisation that operates under legal rules conferred or imposed on it.”²²³ Weighted against this part of the test is the fact ASA’s rule making and enforcement is carried out privately, although codes are developed in consultation with government departments where appropriate.²²⁴ On the other hand, the Broadcasting Standards Authority’s jurisdiction over broadcast advertising was formally removed in 1993, described by the Hon. Maurice Williamson as a “transfer of responsibility for broadcasting advertising standards”.²²⁵ Further, the ASA’s jurisdiction is recognised in the Broadcasting Standards Act 1989 (BSA).²²⁶

This indication of Parliament’s intention to transfer responsibility and the recognition of the ASA in the BSA could be used to argue that there was a conference pursuant to law. Although this is not a direct statutory conferment of authority, the use of the word “pursuant” in addition to the word “by” suggests a wider scope. Further, there is judicial recognition that the ASA “determines what advertising is or is not communicated to the public by substantially the whole of the media throughout the country”.²²⁷ This is a coercive function²²⁸ the Government would no doubt take over if

²²² *Electoral Commission v Cameron* 2 NZLR 421 at 433 (Gault J) (albeit in the context of considering whether the ASCB could be judicially reviewed).

²²³ Ministry of Justice, above n 224 although this is perhaps a rather stretched interpretation of the phrase “conferred or imposed”.

²²⁴ New Zealand Advertising Standards Authority, above n 44.

²²⁵ (1 July 1993) 536 NZPD 16538.

²²⁶ The Broadcasting Standards Act 1989, s 8(2), gives the Broadcasting Standards Authority a “backstop” jurisdiction to hear complaints about advertising where “neither the broadcaster nor the advertiser recognise ... the jurisdiction of the [ASCB]”.

²²⁷ *Electoral Commission v Cameron* [1997] 2 NZLR 421 at 423.

²²⁸ Suggested in an obiter statement in *Ransfield v The Radio Network* [2005] 1 NZLR 233 at [69] to be a relevant factor.

it were being misused; therefore there is a strong policy argument that a wide interpretation of conferment by law should be taken. If this were the case, any restriction of freedom of expression would have to be “demonstrably justifiable” under s 5 of the NZBORA.

2. Application of NZBORA to commercial expression

It is accepted that s14 of the NZBORA extends to commercial expression,²²⁹ although limitations on commercial speech are easier to justify than for other forms of speech.²³⁰ Common arguments used to justify extending protection to commercial expression include firstly, that it can inform the viewer (for example about available products and where to buy them)²³¹, secondly that it can contribute to “the marketplace of ideas” (a justification for freedom of expression generally)²³², and thirdly that it is difficult to strip protection from commercial expression without endangering protection for other kinds of valued expression.²³³

Where regulation is prima facie inconsistent with a particular right or freedom, it may still be found consistent with the NZBORA if the inconsistency is considered a

²²⁹ The NZ Court of Appeal acknowledged that the right to freedom of expression exists in the commercial field in *Hosking v Runting* [2005] 1 NZLR 1 at [285] (Tipping J), at [132] (Gault J) and at [262] (Anderson J).

²³⁰ At [131] (Gault P) who acknowledges with apparent approval a US Supreme Court quote that commercial speech is only afforded “a limited measure of protection” and then goes on to say at [131] that “The importance of the value of the freedom of expression therefore will be related to the extent of legitimate public concern in the information publicised.”; See also Andrew S Butler *The New Zealand Bill of Rights Act: a commentary* (LexisNexis NZ, Wellington, NZ, 2005) at 13.7.22 who note that Courts in multiple jurisdictions are willing to limit commercial expression quite readily.

²³¹ See Selene Mize “The Word Dog Never Bit Anyone: The Tobacco Advertising Ban and Freedom of Expression” (1993) 8 Otago L Rev 425 at 427.

²³² Elizabeth L McNaughton and Christopher M Goodridge “Canadian Approach to Freedom of Expression and the Regulation of Food and Drug Advertising, The” (2003) 58 Food & Drug LJ 521 at 524.

²³³ Elizabeth L McNaughton and Christopher M Goodridge “Canadian Approach to Freedom of Expression and the Regulation of Food and Drug Advertising, The” (2003) 58 Food & Drug LJ 521 at 524 note that “many political, economic, and social ideas are inherent in commercial expression” and it is difficult to imagine a clear dividing line ever being drawn between what counts as valuable or non-valuable commercial speech, is a book about a politician or political philosophy commercial when money is charged for it? Does it now get no protection? What about a cartoon or comic-strip with political undertones? Therefore weakening protection for commercial expression arguably risks weakening protection for information embodying the aforementioned values.

reasonable and demonstrably justifiable limitation under s 5. The New Zealand Supreme Court explained what was required for s 5 in *Hansen v R*,²³⁴ adopting the approach of the Canadian Supreme Court in *R v Oakes*:²³⁵

1. The objective of the impugned provision must be of sufficient importance to warrant overriding a constitutionally protected right or freedom; it must relate to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important.
2. Assuming that a sufficiently important objective has been established, the means chosen to achieve the objective must pass a proportionality test; that is to say they must:
 - a) be “rationally connected” to the objective and not be arbitrary, unfair or based on irrational considerations;
 - b) impair the right or freedom in question as “little as possible”; and
 - c) be such that their effects on the limitation of rights and freedoms are proportional to the objective.

The aim of protecting a children from HFSS advertising that is likely to negatively influence their diets seems a sufficiently important purpose to justify further self-regulation or legislation shielding children from such advertising. Given the evidence base for the effects of advertising on children’s consumption habits,²³⁶ it is submitted that restrictions would be rationally connected to this objective. The question arises, however, of how strong the evidence base must be. In *RJR MacDonald v Canada*,²³⁷ a Canadian Supreme Court case considering a ban on tobacco advertising, the Court found that it was not necessary to have direct evidence or scientific proof, but that the absence of any proof would be fatal.²³⁸ Handsley and others also note that there are

²³⁴ *R v Oakes* [1986] 1 SCR 103 (ca) at 1335–1336; in *Hansen v R* [2007] NZSC 7 (nz) at [63] Blanchard J see also Tipping J at [104]; McGrath J at [204] & [205]; Anderson J at [272].

²³⁵ *R v Oakes*, above n 237.

²³⁶ Links between HFSS advertising and negative health outcomes are not easy to draw in a conclusive manner and there are significant methodological difficulties, however there are parallels between evidence of the effects of HFSS food advertising and alcohol advertising, When debating further alcohol advertising restrictions both Attorney-General of New Zealand *Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the Liquor Advertising (Television and Radio) Bill* (2009) at 4; and Law Commission *Chapter 19: Advertising, sponsorship and promotion of alcohol, in Alcohol in our lives: Curbing the harm* (NZLC R114, 2010) at 26 considered that the evidence was sufficient to fulfill the rationality limb.

²³⁷ *RJR MacDonald v Canada* [1995] 3 SCR 199 (ca) at [154]–[159].

²³⁸ At [6].

“numerous precedents for adopting a precautionary approach when it comes to the protection of children”²³⁹, justifying relying on best available evidence rather than requiring the best possible evidence.

Part 2(b) of the test in *Hansen* involves “considering whether Parliament might have sufficiently achieved its objective by another method” that is less of an infringement on rights.²⁴⁰ It is clear that current forms of *advertising restriction* have not been sufficient in achieving the objective of reducing children’s exposure to advertising with negative health consequences in any significant way,²⁴¹ therefore one could argue stronger forms are necessary. However, with respect to the broader underlying objective of reducing childhood obesity, no one has argued that advertising restrictions are the *only* way to achieve this goal,²⁴² and it is well accepted that there are many other ways of combating the issue that do not infringe on freedom of expression.²⁴³ While Parliament could point to other attempted interventions that have yet to have a significant impact on the problem,²⁴⁴ the fact there has been a call for intervention in many other areas²⁴⁵ goes against advertising restrictions fulfilling this limb.

²³⁹ Elizabeth Handsley and others “A Children’s Rights Perspective on Food Advertising to Children” (2014) 22 Int’l J Child Rts 93 at 127 the authors also identify the need for a closer conversation between the health, legal and regulatory sectors about the exact meaning of causation.

²⁴⁰ *Hansen v R*, above n 237, at [126] Tipping J.

²⁴¹ See Part I(C) and Part II(B)(2), see also Swinburn, Dominick and Vandevijvere, above n 82, at 17.

²⁴² See Chandon and Wansink, above n 12 who points out that advertising restrictions are by no means the only way to improve eating habits and at 587 that television advertising specifically “is neither the most innovative nor the most powerful way food marketing works, and its importance is declining”, suggesting numerous methods to improve consumption habits.

²⁴³ AMD Silva-Sanigorski, and C Economos “Evidence of multi-setting approaches for obesity prevention: translation to best practice” in E Waters and others (eds) *Preventing Childhood Obesity: Evidence Policy and Practice* (Blackwell Publishing Ltd, Oxford, 2010) at 57 observes that “Childhood obesity is a complex issue and both individual efforts and societal changes are needed”; See also Gary Sacks, Boyd A Swinburn and Mark A Lawrence “A systematic policy approach to changing the food system and physical activity environments to prevent obesity” (2008) 5 Aust N Z Health Policy 13 regarding the obesity epidemic generally, the authors suggest a multitude of interventions to both energy intake and output, for example taxes and subsidies and incentives for welfare recipients to purchase healthier foods, changes in primary production subsidies and taxes, changes to land-use laws to reduce the concentration of fast-food outlets, and town planning to ensure free and public spaces for exercise; Boyd A Swinburn and others “The global obesity pandemic: shaped by global drivers and local environments” (2011) 378 The Lancet 804 at 810 add to this increased marketing of healthier choices, and increased focus on health education and health promotion programmes.

²⁴⁴ For example the MOHFNS guidelines for schools, and the FSANZ NPM system to prevent health claims on unhealthy foods, see Part II(B)(1)(a).

Part 2(c) requires that the limitation of rights is proportional to its objective. All proposed new restrictions would still leave advertisers free to advertise healthier foods at all times of the day, and HFSS foods at times and in media not favoured by children. New Zealand has severely restricted marketing of tobacco products since 1990,²⁴⁶ and, discussing similar restrictions, the Canadian Supreme Court held in *RJR MacDonald* that even a small reduction in tobacco use was proportional to a limit on the right to freedom of expression.²⁴⁷ While there are obvious differences between tobacco and HFSS foods, this illustrates an acceptance that such a measure does not need to constitute a silver-bullet solution in order to pass scrutiny under s 5. The generally agreed fact that food advertising does have *some* influence on children's diet choices and the logical inference that a restriction on HFSS advertising would reduce the propensity to consume such foods by at least a small amount is likely to be sufficient. Therefore it is submitted the proportionality limb would be fulfilled.²⁴⁸

The *Oakes* test was also discharged when the Canadian Supreme Court considered the Quebec ban on all advertising to children in *Irwin Toy*, due to the importance of protecting a vulnerable group,²⁴⁹ the fact the ban was rationally connected to protecting children from advertising (and that advertising could still be targeted at parents and other adults),²⁵⁰ and that lesser restrictions would not have been effective at reducing exposure.²⁵¹

In summary, further restrictions may ultimately run afoul of the NZBORA, due to the large variety of other methods available to potentially reduce childhood obesity that do not restrict freedom of expression.

²⁴⁵ See Swinburn, Dominick and Vandevijvere, above n 82, at 14 for a recent evaluation of infrastructure and implementation of policies to change the NZ food environment.

²⁴⁶ See Smoke-free Environments Act 1990.

²⁴⁷ *RJR MacDonald v Canada*, above n 240, at [146].

²⁴⁸ Contrast Attorney-General of New Zealand, above n 239, at 7 who, when reporting to Parliament regarding a complete ban on broadcast advertising of alcohol found that the limited and conflicting evidence on the matter counted against fulfillment of the proportionality limb.

²⁴⁹ *The Attorney General of Quebec v Irwin Toy Limited* [1989] 1 SCR 927 at 989, see discussion above at Part II(D)(1).

²⁵⁰ At 991.

²⁵¹ At 995-996.

3. A middle ground approach

Yosifon criticises the US Federal Trade Commission and Courts' approach to advertising restrictions, especially the tolerance for puffery;²⁵² the objections to any form of restriction on price advertising; and the hesitancy to effectively restrict HFSS food advertising to children if that also requires restricting most HFSS food advertising to adults.²⁵³ With this in mind, the author suggests the extremely restrictive alternative approach of limiting HFSS advertising to a "tombstone" format, which is "a brief description or picture of the product, its price, information about where it can be purchased and basic nutritional information."²⁵⁴ This approach could either be applied partially (for example up until the 8.30pm 'floodgate' period on television) or more fully. The Quebec approach may have also had the effect of encouraging this style of advertising, with one lawyer advising advertisers to avoid being classed as appealing to children by "concentrating on issues such as nutritional value and health impact."²⁵⁵

While perhaps extreme, this approach brings to the forefront the question of what exactly it is about commercial expression that justifies its protection. A number of arguments against extending restrictions on HFSS advertising will now be discussed.

Multiple commentators warn of the economic downsides of advertising restrictions, for example the increased difficulty of price comparison for consumers;²⁵⁶ diminished

²⁵² See David G Yosifon "Resisting Deep Capture: The Commercial Speech Doctrine and Junk-Food Advertising to Children" (2006) 39 Loy LA L Rev 507 at 525 for discussion, at 531 the author defines puffery as "a nebulous but broad category of hyperbole and bluster that in the eyes of the law does not constitute false or misleading advertising" because consumers do not rely on it, and at 533 cites a literature review stating "no behavioural studies have reported the finding, assumed by the law, that consumers typically see puffery and other loophole claims as meaningless."; Colin Mitchell "A legal analysis of advertising of unhealthy foods to children: a case for regulatory reform?" (2013) 382, Supplement 3 The Lancet S5 also critiques the exclusion of "exaggerated statements" from EU legislation.

²⁵³ Yosifon, above n 255, at 583 footnote 337 see also at 539, the author argues against piecemeal bans of specific types or methods such as the use of cartoon characters, suggesting that marketers will always "stride several steps ahead".

²⁵⁴ At 584; compare Simon Chapman "The ethics of tobacco advertising and advertising bans" (1996) 52 Br Med Bull 121 at 123 who, regarding a tombstone approach for tobacco advertising argues that the great deal of research going into selecting names, designing packaging and selecting slogan words mean it is fallacious to argue that this kind of advertising is devoid of persuasive intent. That being said, it is likely to prevent many techniques that grab children's attention.

²⁵⁵ Hawkes, above n 199, at 32.

²⁵⁶ Mize, above n 234, at 428.

price competition resulting in higher prices, thus driving consumers to poorer quality products to compensate;²⁵⁷ and an increased difficulty in launching new products or even new businesses, resulting in an oligopoly for existing businesses.²⁵⁸ It is submitted, however, that allowing advertising of non-HFSS foods, and HFSS foods after 8.30 pm and in other mediums would help to mitigate these potential effects. The tombstone approach also avoids the argument by allowing for price advertising.

Another strong argument against restricting advertising for public health reasons is the lack of meaningful distinctions between one public health problem and another. For example McIntyre J, speaking for the minority in *Irwin Toy*, stated that the limitations caused by the Quebec ban were not so severe that “if sustained they will cause irremediable damage”, but nevertheless he considered that “these limitations represent a small abandonment of a principle of vital importance in a free and democratic society” and therefore, even if children were being adversely affected, he did not think the restrictions should be sustained.²⁵⁹

Mize similarly objected to a tobacco advertising ban (albeit the ban was irrespective of advertising content and not based on the foundation that previous advertising had been misleading in any way) on the basis that there is no meaningful distinction between the possible harm caused by use or overuse of a product such as tobacco or HFSS food and that caused by other potentially harmful products, including for example war toys, hazardous sports equipment, meat and sexually explicit material.²⁶⁰ Yosifon does see a meaningful justification for regulating HFSS food advertising and not other types of products, citing the “human suffering”²⁶¹ wrought by the obesity epidemic and the fact that HFSS food is a “particular kind of product and consumer market that is highly susceptible to powerfully manipulative advertising campaigns”.²⁶² However it is

²⁵⁷ Yosifon, above n 255, at 553 discussing arguments in *Virginia State Bd. of Pharmacy*, 425 U.S.

²⁵⁸ Simon P Anderson “Regulation of television advertising” in Paul Seabright (ed) *The Economic Regulation of Broadcasting Markets* (Cambridge University Press, Cambridge, 2007) 189 at 210.

²⁵⁹ *The Attorney General of Quebec v Irwin Toy Limited*, above n 252, at 1008.

²⁶⁰ Mize, above n 234, at 438.

²⁶¹ Yosifon, above n 255, at 589.

²⁶² See At 524 the author cites research arguing that HFSS advertising makes use of deeply ingrained information-transmitting cues that “have been shown to be influential in the development of eating habits in other mammals, involving themes such as food being fought

questionable whether these factors provide a firm ground to assuage the fear that the choice to apply or not apply this approach to other advertising in the future is because of the “idiosyncrasies of the members of the government, rather than the objective application of neutral principles”²⁶³ that distinguish one product from another. Nevertheless, some might be happy to consider restricting advertising of any product that can be shown to be harmful.

The tombstone approach is one option that attempts to protect children while preserving a flow of commercial information to others.

B. Children’s Rights

New Zealand has signed and ratified the United Nations Convention on the Rights of The Child (UNCROC).²⁶⁴ The preamble to the Children’s Code states that it:²⁶⁵

...recognises the need to extend a duty of care to protect children pursuant to the United Nation's Convention on the Rights of the Child ("Convention"). Special notice is to be taken of Article 3 of the Convention, which states, "the best interests of the child shall be a primary consideration". Article 13 recognises the child's right to freedom of expression. "This right shall include the freedom to seek, receive and impart information and ideas of all kinds." Children therefore have the right to receive all kinds of information, including advertisements. However, Article 17(e) calls for "appropriate guidelines for the protection of the child from information and material injurious to his or her well-being." This Code provides the "appropriate guidelines" for food advertisements that influence children.

over, or the consumption of a food item being accompanied by exaggerated visible signs of enjoyment as well as health and vitality generally”, and at 537 suggests that HFSS advertising associating products with “fun, magic, health and vitality ... may mislead people with respect to their perception of and conception of the health consequences of frequent junk-food consumption, in ways common sense fails to see” and at 590 argues that due to this fact, such “puffing strategies” should be off limits for HFSS products as opposed to products not associated with negative health consequences.

²⁶³ Mize, above n 234, at 438.

²⁶⁴ Ministry of Justice “United Nations Convention on the Rights of the Child” (2014) Ministry of Justice <www.justice.govt.nz>.

²⁶⁵ Childrens Code For Advertising Food 2010.

Notably Article 13(2)(b), which provides for restrictions on this right including for the protection of public health, is not included in the Children's Code preamble.

Article 13 provides for a child's right to receive information of all kinds (subject to the need for protection of public health), while Article 17 provides for a right to access information from diverse sources, especially those aimed at promoting, *inter alia*, health. Thus, restrictions on food advertising are acceptable under the Article 13(2)(b) exception for public health goals. However, Article 17 provides a positive right to ensure availability of information conducive to wellbeing,²⁶⁶ and there could arguably be a point where too much restriction of information is not conducive to wellbeing, since becoming overly sheltered may be of detriment to a child's development in other ways.²⁶⁷

To minimise infringement on Article 13, Handsley argues, similarly to Yosifon,²⁶⁸ that food advertising restrictions "should focus on those kinds of advertising that do not really amount to 'information' but are rather appeals to emotion or irrelevant considerations to make the consumer better disposed towards the product"²⁶⁹, giving the examples of premiums and celebrity endorsements.²⁷⁰ The tombstone format suggested above represents the extreme of this approach.

The authors also argue that strict advertising regulation may help the state discharge its

²⁶⁶ As well as physical health, Article 17 also applies to social, spiritual and moral well-being and mental health.

²⁶⁷ For example Mize, above n 234, at 429 who (while not discussing children specifically) points out that "A common perception is that the government has 'sanitized' the media and removed all harmful messages. Critical scrutiny of the media by the public diminishes in such a situation, and powers of judgement atrophy", however, given that media literacy does not provide an effective defense against the influence of advertising without cues until children are older (see Part II(C)(1)(c)), it appears that some restrictions will be beneficial, although media literacy should still be part of education curriculums; See also Yosifon, above n 255, at 583 who observes that certain advertising "may enable the exploration and expansion of the possibilities of individual or collective identity formation".

²⁶⁸ See Part III(A)(3).

²⁶⁹ Handsley and others, above n 242, at 128.

²⁷⁰ Moira Smith and others "Consuming calories and creating cavities: beverages NZ children associate with sport" (2014) 81 *Appetite* 209 at 214, note that while Guideline 3(b) of the Children's Code restricts the use of "Persons or characters well known to children" to promote HFSS foods, sports heroes are still used to promote HFSS sports drinks and that this has likely influenced consumption on both sport and non-sport occasions.

role to support parents in fulfilling their child-rearing responsibilities²⁷¹ as required by Article 18(2). However Article 3(2) requires state parties to take the rights of parents into account, thus UNCROC does not provide an unqualified justification to restrict adults' rights in favour of children. However it is observed that while "parents with limited access to information about food products cannot make meaningful choices about those products ... it is debatable whether television food advertising typically provides the kind of information that can meaningfully inform parental choices about their children's diet."²⁷² This statement is applicable to much of the type of advertising used to attract children in general, and reinforces the conclusion that restrictions should focus on particular advertising techniques that do not significantly convey information.

C. Paternalism and Personal Responsibility

Food industry actors and politicians have repeatedly framed the issue of obesity as one of individual or parental responsibility.²⁷³ The "conceptual cousin" of such arguments is that government intervention is nanny-statist or paternalistic.²⁷⁴

Paternalism is commonly defined as "the interference of a state or an individual with another person, against their will, and defended or motivated by a claim that the person interfered with will be better off or protected from harm",²⁷⁵ and is considered objectionable by some due to its support for interfering with the right to make decisions for oneself, and infringing autonomy.²⁷⁶ Despite this, New Zealand's legal landscape contains a number of restrictions on freedom that are at least partly motivated by the

²⁷¹ Handsley and others, above n 242, at 122.

²⁷² At 122.

²⁷³ See Hoek and Maubach, above n 119, at 163 who report that "the advertising industry has been quick to frame the debate as an issue of freedom concerning the extent to which governments should adopt a paternalistic approach to regulation"; and in Isaac Davison "Poll finds majority support for 'fat tax'" *New Zealand Herald* (online ed, Auckland, 24 July 2014) the Health Minister Hon. Tony Ryall is quoted as saying "The Government's preference is to provide information and support for individuals and families rather than nanny state regulation."; See also Kelly D Brownell and others "Personal Responsibility And Obesity: A Constructive Approach To A Controversial Issue" (2010) 29 *Health Aff* 379 at 379.

²⁷⁴ Brownell and others, above n 276, at 379; The term nanny-statist is often used synonymously with paternalist, Oxford English Dictionary *nanny*, *n.1 and adj.* (3rd online ed, 2013) defines "nanny-state" as meaning "the government or its policies viewed as overprotective or as interfering unduly with personal choice".

²⁷⁵ Gerald Dworkin "Paternalism" (2014) *The Stanford Encyclopedia of Philosophy* <<http://plato.stanford.edu>>.

²⁷⁶ Dworkin, above n 278.

desire to prevent individuals from harming themselves (for example prohibitions on tobacco advertising, supermarkets selling spirits, or taxes on tobacco).²⁷⁷ While on the one hand these examples illustrate that New Zealand's regulatory environment is amenable to such interventions, they could also support a slippery slope argument by pointing out a trend towards increased paternalistic interventions.

Many argue that paternalism does not apply to measures directed at children given that they are not "in the maturity of their faculties"²⁷⁸ or, specifically discussing advertising, that they are "more naïve and less critical."²⁷⁹ Others accept that it is paternalistic, but justifiable due to a child's "right to an open future".²⁸⁰ However, as was illustrated in Part II(B), defining what counts as advertising directed at or influencing children is not simple, and any effective restriction is likely to also affect the population at large. Because restrictions will affect adults, paternalism cannot be dismissed as a consideration, and it will be discussed in more detail.

Two varieties of paternalism are commonly identified: hard paternalism, involving directly coercing an individual to act in a certain way, and soft paternalism, involving, inter alia, giving unwanted information, or altering default rules or frames.²⁸¹ A restriction on advertising interferes with an advertiser's liberty in order to benefit consumers. Therefore advertising restrictions are soft-paternalistic with respect to potential consumers,²⁸² as they are not directly coercive. There is a gradation from soft to hard paternalism, depending on how difficult it is to still pursue a discouraged choice.²⁸³ For example, a complete restriction on HFSS advertising will potentially

²⁷⁷ Smoke-free Environments Act 1990, s 2 for tobacco advertising restriction; Sale of Liquor Act 1989, s37(3) for supermarket alcohol sale laws; New Zealand Customs Service "New excise duties rates for tobacco and tobacco products from 1 January 2014" (22 November 2013) New Zealand Customs Service <www.customs.govt.nz> for tobacco taxes.

²⁷⁸ JS Mill *On Liberty*, David Spitz (ed) (WW Norton & Company Inc, New York, 1975) at 11.

²⁷⁹ Fernando D Simoes "Paternalism and Health Law: Legal Promotion of a Healthy Lifestyle" [2013] Eur J Risk Reg 347 at 359.

²⁸⁰ Michael S Merry "Paternalism, Obesity, and Tolerable Levels of Risk" (2012) 20 Democracy & Education 1 at 2.

²⁸¹ This type of paternalism is also referred to as "libertarian paternalism", see Cass R Sunstein and Richard H Thaler "Libertarian Paternalism Is Not an Oxymoron" (2003) 70 U Chi L Rev 1159, the examples given above at n 280 are all of soft or libertarian paternalism.

²⁸² Daniel Hays Lowenstein "Too Much Puff: Persuasion, Paternalism, and Commercial Speech" (1987) 56 U Cin L Rev 1205 at 1044.

²⁸³ S Holm "Obesity interventions and ethics" (2007) 8 Obesity Reviews 207 at 207.

make it harder for those wishing to purchase HFSS food to find out about products, pricing or places of purchase, and may also have the indirect effect of increasing prices due to diminished price competition,²⁸⁴ but restricting advertising techniques to basic product and price information would avoid this. Thus, it is easier to justify restrictions on technique than it is on provision of information.

Public health interventions can also be justified by their ability to reduce economic costs imposed on society, which is considered a non-paternalistic goal as it is protecting others (taxpayers) from harm. However, while this supports the argument for interventions aiming to minimise obesity-related health consequences, some argue that economic justifications are inadequate or at worst dangerous, as public health is not simply a matter of accounting and could be used to “justify public savings with a number-centered logic that over-rides human dignity.”²⁸⁵ Perhaps a better argument to support intervention is the *socio* economic cost, as “the aggregate consequences of individual choices are countless preventable disabilities and deaths, affecting families and the entire community.”²⁸⁶

Lowenstein points out a potential inconsistency in paternalistic arguments against advertising restriction, observing that commercial advertising is often intentionally placed so that consumers receive the message whether they want to or not. Therefore, while restrictions may interfere with consumer liberty, they may also enhance it by enabling the avoidance of unwanted messages. Although one might justify this contradiction by arguing that increased availability of information can only lead to increased freedom, there is a tension in the argument, as the decision of what information to acquire is itself a choice that should arguably be left to the individual.²⁸⁷ However, while this argument may justify restrictions on public space and television advertising, it becomes problematic for online and social media advertising within a

²⁸⁴ See above 258, the argument is that diminished price competition will result in higher prices, and increase the difficulty of launching new products or even new businesses, resulting in an oligopoly for existing businesses. Although compare above n 261 at 210 where Anderson suggests that restrictions could lead to an increased emphasis on price reductions as an advertising technique, which would potentially result in *increased* price competition.

²⁸⁵ Simoes, above n 282, at 354.

²⁸⁶ At 354.

²⁸⁷ Lowenstein, above n 285, at 1244.

company's own page or website,²⁸⁸ as once a website has been intentionally accessed the argument becomes considerably weaker.

Another common argument is that controlling children's diets is a matter of parental responsibility,²⁸⁹ thus restrictions on advertising on the basis of children's vulnerabilities are perhaps perceived as a patronising vote of no confidence by the state in parental ability, or alternatively as a free pass for parents to cease paying attention to controlling children's diets. Simoes points out that regulation that limits marketing of less healthy products does not remove them from the market; it merely hides them from children in an attempt to limit them undermining parental control. Children will still no doubt discover them, and this is the point where environmental protections such as advertising restrictions need to be supplemented with parental control.²⁹⁰ On a similar note, Holm argues that framing obesity as simply an issue of personal or parental responsibility is somewhat hypocritical if society could reduce it by prohibiting specific marketing strategies, but declines to do so.²⁹¹

Some have also regarded the prevalence of obesity as a sign of market failure, as "the free market system is failing to promote and sustain long-term individual and social goals"²⁹² and that therefore, by orthodox economic theory, government should intervene with policies and regulations altering the marketplace so that the population can gain greater long-term utilities. This however opens a debate on what sort of market failure justifies intervention, as well as what counts as long-term utility. Zywicki for example argues that utility decreases as a person moves away from their ideal (for example medically or aesthetically optimal weight), however, they might also gain utility from consuming good tasting food, while exercise may reduce utility for them, for example by ensuring less leisure time.²⁹³ While for children the right to an open future arguably justifies measuring utility by a lower weight being achieved, it becomes less convincing as age and thus autonomy increases. Some commentators have nevertheless

²⁸⁸ See above n, 91.

²⁸⁹ FOE: Fight the Obesity Epidemic "TV advertising" (9 April 2011) FOE: Fight the Obesity Epidemic <www.foe.org.nz>.

²⁹⁰ Simoes, above n 282, at 358.

²⁹¹ Holm, above n 286, at 209.

²⁹² Boyd A Swinburn "Obesity prevention: the role of policies, laws and regulations" (2008) 5 Australia and New Zealand Health Policy 12 at 14.

²⁹³ Zywicki, Holt and Ohlhausen, above n 7, at 982.

tried to justify market intervention. The argument is that evidence such as widespread dissatisfaction with body weight among adults and adolescents,²⁹⁴ the size of the diet industry, the prevalence of diet products,²⁹⁵ and the fact that there is also no evidence personal responsibility has decreased as obesity has increased,²⁹⁶ demonstrates that the market is not providing consumers with an ideal food choice environment.

Others argue that paternalistic interventions are justifiable on a social justice basis; commentators often point out that obesity rates are higher in more economically deprived areas,²⁹⁷ and that poorer families are more likely to purchase cheaper (and often less healthy) food for themselves and their children.²⁹⁸ According to a focus group conducted with Maori and Pasifika families this is due to price and accessibility barriers.²⁹⁹ If it is price and availability that are driving the higher levels of obesity there, social justice is not a justification for paternalist advertising restrictions because they will have little or no impact on fixing the health of people in those communities.

While the recognition that obesogenic environments are an environmental threat to health may be conducive to further policy making, people are still ultimately making their own choices within this environment, and restricting their autonomy remains an issue. While there is some support for the idea that people are not necessarily acting rationally within this environment, and most would find the idea of strong state intervention based on an assertion that environmental factors were overriding their free will distasteful, there is arguably some room for soft options targeting the environment,

²⁹⁴ Rob Moodie and others “Childhood obesity – a sign of commercial success, but a market failure” (2006) 1 *Pediatr Obes* 133 at 136.

²⁹⁵ Boston Medical Centre “Tools for Ideal Weight Control: Nutrition & Weight Management” (2014) Boston Medical Centre <www.bmc.org> estimate that 45 million Americans diet each year, and \$33 billion is spent annually on weight loss products.

²⁹⁶ Brownell and others, above n 276, at 380 cites studies of adolescent behaviours showing a decrease in the amount of unprotected sex and alcohol consumed, and an increase in use of seat belts over the last 20 years.

²⁹⁷ Ministry of Health *The health of New Zealand children 2011: key findings of the New Zealand health survey* (Ministry of Health, Wellington, NZ, 2012) at 28.

²⁹⁸ Merry, above n 283, at 5.

²⁹⁹ Office of the Auditor-General New Zealand “Evolving approach to child obesity Part 2: Summary of research into community perspectives” (June 2013) Office of the Auditor-General New Zealand <www.oag.govt.nz> at 210, in a focus group conducted on behalf of the Auditor-General both Maori and Pasifika parents felt childhood obesity was poverty related for example “knew that children should be eating fresh fruit and vegetables, but the cost of these led to families picking quantity over quality” and also at 2.11 “the cost and convenience of low-quality foods and the over-abundance of take-away outlets in urban areas.”

and it is submitted further restrictions on HFSS advertising may be one of these options.

The further restrictions impose negligible restriction on individuals' ability to choose, and are focused on encouraging healthier choices rather than coercing them. Further, future restrictions can avoid key objections and thus perhaps be more palatable if they allow for basic product, price and availability information. Ultimately the strongest objections to government imposing further restrictions are the lack of meaningfully distinguishing factors between the environmental contributors to obesity-related illness and to other ills. This is a risk applicable to non-communicable disease in general, particularly when the causes are complex and legion, and there is a consensus that a variety of interventions will be required.³⁰⁰ While Swinburn argues that using hard policy options to target the environment (making the healthy environment the easier choice) and using soft policy options to target the population (encouraging people to make the easier choice) "puts lie to the perception ... that the state will be telling people what they can and cannot eat",³⁰¹ the fear is perhaps that what some have described as the "tyranny of small decisions" of making food choices in an obesogenic environment³⁰² will be met with a tyranny of minor legislative interventions.³⁰³

Conclusion

Part I noted the increasing prevalence of childhood obesity and its associated health problems in New Zealand. Many attribute this to an increasingly obesogenic environment³⁰⁴ and part of this environment includes advertising of HFSS foods. The large evidence base supporting the theory that food advertising has at least a modest

³⁰⁰ See above n 243.

³⁰¹ Swinburn and Egger, above n 6, at 17.

³⁰² Paul Anand and Alastair Gray "Obesity as Market Failure: Could a 'Deliberative Economy' Overcome the Problems of Paternalism?" (2009) 62 *Kyklos* 182 at 185.

³⁰³ A similar fear is held with tobacco restrictions, for example ONE News "Plain packaging for fizzy drinks 'in the next 10 years'" *TVNZ* (online ed, Auckland, 30 May 2014) quotes Auckland University marketing expert Dr Mike Lee saying "plain packaging for tobacco products has caused an uproar with concerns it could spill over into fast food and alcohol products" and that "there is the worry from companies that we are going to become more and more of a nanny state".

³⁰⁴ As discussed in Part I(B) Ministry of Health, above n 4 define an obesogenic environment as one "that promotes over-consumption of food and drinks and limits opportunities for physical activity."

effect on food choice has led many to call for bans or restrictions on HFSS food advertising.

Part II reviewed the regulatory approach in New Zealand. The CAB restricts HFSS advertising during children's television shows, however these times do not correspond with the times most children are in fact watching. Bringing the restriction times more in line with children's actual viewing times would be beneficial. New Zealand has the benefit of the ASA, which regulates advertising generally in all mediums, has 100% compliance with its decisions, and has specific guidelines for HFSS foods, however it is complaints based, and the lack of monitoring may mean much advertising (particularly online) goes unnoticed. Further, there is inconsistency in the ASA's interpretation of whether the guidelines for food advertising to children apply to a complaint, and some inconsistency with previous decisions. It is submitted that when addressing advertising associated with a public health issue, the ASA should be more consistent in its reasoning. More prescriptive guidelines, such as those used in Quebec may assist with this.

Part III looked at rights implications and legitimacy of advertising restrictions. There is some support from overseas jurisdictions that more severe restrictions are consistent with freedom of expression, such as from Quebec. However further restrictions by Parliament (and possibly also by the ASA) may run afoul of the NZBORA due to the multitude of other approaches that could be taken to try and reduce the prevalence of childhood obesity without infringing on freedom of expression. One general objection to advertising restrictions is their potential to drive prices up. Focusing on restricting particular techniques rather than categorical restrictions could avoid this objection. Others argue that it is impossible to meaningfully restrict advertising with the goal of minimising harm caused by certain uses of one product, without opening the door to restrictions on other products.

Restrictions that reduce children's exposure to advertising are justifiable under Article 13(2)(b) of UNCROC. However there is a point where being overly sheltered from information may be inconsistent with Article 17. This reinforces the conclusion that in

general, advertising restrictions should focus on particular advertising techniques that do not convey information.

Advertising restrictions of this kind can be considered paternalistic. However, the New Zealand legal landscape is amenable to soft-paternalistic intervention, and such interventions can be justified by the fact they can reduce socio economic costs on society and the fact that some advertising restrictions are arguably liberty increasing by helping consumers avoid unwanted messages. Advertising restrictions are not intended to act in lieu of parental responsibility or as a vote of no confidence in it, they are a support mechanism. The further restrictions suggested impose minimal restriction on individuals' ability to choose, and are focused on encouraging healthier choices rather than coercing them. The Government should consider implementing these restrictions in some form, whether by direct legislation or more direct guidance for self-regulation such as that proposed in the Public Health Bill 2007. Ultimately the strongest objections to Government imposing further restrictions are lack of meaningfully distinguishing factors between the environmental contributors to obesity-related illness and to other ills.

Appendix 1. The NZ Advertising Standards Authority Children's Code For Advertising Food 2010

INTRODUCTION

All advertisements for food and beverages ("food") that influence children, whether contained in children's media or otherwise, shall adhere to the Principles and Guidelines set out in this Code.

The Code recognises that children are not a homogeneous group but have varying levels of maturity and understanding. Care should be taken to ensure that the product and style of advertisement is appropriate for the intended audience.

The Code recognises the need to extend a duty of care to protect children pursuant to the United Nation's Convention on the Rights of the Child ("Convention"). Special notice is to be taken of Article 3 of the Convention, which states, "the best interests of the child shall be a primary consideration". Article 13 recognises the child's right to freedom of expression. "This right shall include the freedom to seek, receive and impart information and ideas of all kinds." Children therefore have the right to receive all kinds of information, including advertisements. However, Article 17(e) calls for "appropriate guidelines for the protection of the child from information and material injurious to his or her well-being." This Code provides the "appropriate guidelines" for food advertisements that influence children.

It is noted that the Convention defines the age of a child as under 18. This Code defines the age of a child as under 14 in line with the Children, Young Persons and their Families Act 1989 and aligns with the Broadcasting Standards Authority definition of a child. The Code for Advertising Food specifically makes reference to young people aged 14 – 18.

Food advertisements should not undermine the food and nutrition policies of Government, the Ministry of Health Food and Nutrition Guidelines nor the health and wellbeing of children. Advertisements for nutritious foods important for a healthy diet are encouraged to help increase the consumption of such foods. However, advertisements should not encourage over-consumption of any food.

In interpreting the code emphasis will be placed on compliance with both the principles and the spirit and intention of the code. The guidelines are examples, by no means exhaustive of how the principles are to be interpreted and applied. Upon considering a complaint, the ASCB is vested with discretion to ensure a common sense outcome.

Advertisements should comply with the laws of New Zealand and appropriate industry codes including the New Zealand Television Broadcasters code "Getting It Right for Children" available on www.nztlbc.co.nz. Attention is also drawn to the "CF" rating system applied by the Commercial Approvals Bureau to all food advertising that is to be screened during children's television programming times.

For the purposes of this Code:

"Children" means all persons below the age of 14.

"Food and Nutrition Guidelines" are the current version of the Food and Nutrition Guidelines for Healthy Children (aged 2-12 years): A background paper, published by the Ministry of Health.

"Social Responsibility" is embodied in the principles and guidelines of the Code and is integral to the consideration of the Advertising Standards Complaints Board. Previous decisions of the Complaints Board also guide its determinations, as do generally prevailing community standards.

"Treat food" is food high in fat, salt, or sugar intended for occasional consumption. Food high in fat, salt, or sugar is also known as energy dense and nutrient poor food (refer to Ministry of Health's "Food and Nutrition Guidelines for Healthy Children (aged 2-12 years): A background paper."

Principle 1 - All advertisements should be prepared with and observe a high standard of social responsibility to consumers and to society.

Guidelines

1(a) Advertisements should not undermine the role of parents in educating children to have a balanced diet and be healthy individuals.

1(b) Children should not be urged in advertisements to ask their parents, guardians or caregivers to buy particular products for them.

1(c) Advertisements for treat food, snacks or fast food should not encourage children to consume them in excess.

1(d) Advertisements for treat food, snacks or fast food should not encourage children to consume them in substitution for a main meal on a regular basis, nor should they undermine the Food and Nutrition Guidelines for Healthy Children.

1(e) Advertisements for food should not portray products as complete meals unless they are formulated as such.

1(f) The quantity of the food depicted in the advertisement should not exceed serving sizes that would be appropriate for consumption by a person or persons of the age depicted.

1(g) Benefits of foods for a nutritious diet should not be exaggerated and should not imply that a single food should replace a healthy diet nor undermine the importance of consuming a variety of foods.

1(h) Nutrient, nutrition and health claims (when permitted) should comply with the requirements of the Food Standards Code*. Such claims should not mislead or deceive the consumer.

1(i) Advertisements should not promote inactive or unhealthy lifestyles nor should they show people who choose a healthy active lifestyle in a negative manner.

1(j) Advertisements for slimming products or foods sold as an aid to slimming should not be directed at children.

***Note:** The regulation of nutrition, health and related claims is currently under review. Please refer to the Food Standards Australia New Zealand (FSANZ) website www.foodstandards.govt.nz for details. The Food Standards Code is available on the FSANZ website.

Principle 2 - Advertisements should not by implication, omission, ambiguity or exaggerated claim mislead or deceive or be likely to mislead or deceive children, abuse the trust of or exploit their lack of knowledge or without reason play on fear.

Guidelines

2(a) Advertisements should be clearly recognisable as such by children and separated from editorial, programmes or other non-advertising content.

2(b) Advertisements should take into account the level of knowledge, sophistication and maturity of the intended audience.

2(c) Care should be taken to ensure advertisements do not mislead as to the nutritive value of any food. Foods high in sugar, fat and/or salt, especially those marketed to and/or favoured by children, should not be portrayed in any way that suggests they are beneficial to health.

2(d) Food advertisements containing obvious hyperbole, identifiable as such by the intended audience, are not considered misleading.

2(e) Advertisements should not claim or imply endorsement by any government agency, professional body or independent agency unless there is prior consent, the claim and the endorsement are verifiable and current and the agency or body named. An endorser represented as an expert should have qualifications appropriate to the expertise depicted.

2(f) Care should be taken with advertisements promoting a competition, premium or loyalty/continuity programme to ensure that advertisements do not encourage frequent repeat purchases of foods high in fat, salt and sugar.

2(g) Advertisements for foods high in sugar should not claim to be "low fat" or "fat free" which could mislead the consumer to believe the food is low in energy or beneficial to health.

2(h) Advertisements for food high in fat should not claim to be "low in sugar" or "sugar-free" which could mislead the consumer to believe the food is low in energy or beneficial to health.

Principle 3 - Persons or characters well-known to children shall not be used in advertisements to promote food in such a way so as to undermine a healthy diet as defined by the Food and Nutrition Guidelines for Healthy Children.

3(a) Persons or characters well known to children may present factual and relevant statements about nutrition and health.

3(b) Persons or characters well known to children should not be used to endorse food high in fat, salt and /or sugar.

Appendix 2. The NZ Advertising Standards Authority Code for Advertising of Food

INTRODUCTION

The purpose of the Code is to ensure that advertising of food will be conducted in a manner that is socially responsible and does not mislead or deceive the consumer.

Advertisements for food and beverages consumed by humans ("food") shall adhere to the Principles and Guidelines set out in this Code. The Code for Advertising Food applies to food advertising to persons 14 years and over. However, Advertisers are also required to exercise a particular duty of care for food advertisements directed at young people aged 14 to 17 years of age.

Food advertisements that influence children are subject to the Children's Code for Advertising Food. Children are defined in the ASA Codes as persons below the age of 14 years.

Advertisements should not undermine the food and nutrition policies of Government, the Ministry of Health 'Food and Nutrition Guidelines' nor the health and wellbeing of individuals. Advertisements for nutritious foods important for a healthy diet are encouraged to help increase the consumption of such foods. However, no advertisement should encourage over-consumption of any food.

In interpreting the code emphasis will be placed on compliance with both the principles and the spirit and intention of the code. The guidelines are examples, by no means exhaustive of how the principles are to be interpreted and applied. Upon considering a complaint, the ASCB is vested with discretion to ensure a commonsense outcome.

Advertisements should comply with the laws of New Zealand and appropriate industry codes.

For the purposes of this Code:

"Appropriate industry codes" includes the Infant Nutrition Council "Code of Practice for the Marketing of Infant Formula" and any other industry code recognised by the ASA.

"Food and Nutrition Guidelines" are a series of nutrition policy papers aimed at specific population groups published by the Ministry of Health.

"Social Responsibility" is embodied in the principles and guidelines of the Code and is integral to the consideration of the Advertising Standards Complaints Board. Previous decisions of the Complaints Board also guide its determinations, as do generally prevailing community standards.

Principle 1- All food advertisements should be prepared with a due sense of social responsibility to consumers and to society. However food advertisements containing nutrient, nutrition or health claims*, should observe a high standard of social responsibility.

Guidelines

1(a) Nutrient, nutrition and health claims (when permitted) should comply with the requirements of the Food Standards Code*. Such claims should not mislead or deceive the consumer.

1(b) Advertisements for food should not portray products as complete meals unless they are formulated as such.

1(c) The quantity of the food depicted in the advertisement should not exceed serving sizes that would be appropriate for consumption by a person or persons of the age depicted.

1(d) Advertisements should not encourage excessive consumption or depict inappropriately large portions of any particular food.

1(e) Benefits of foods for a nutritious diet should not be exaggerated and should not imply that a single food should replace a healthy diet or undermine the importance of consuming a variety of foods.

1(f) Advertisements should not promote inactive or unhealthy lifestyles nor should they show people who choose a healthy active lifestyle in a negative manner.

***Note:** The regulation of nutrition, health and related claims is currently under review. Please refer to the Food Standards Australia New Zealand (FSANZ) website www.foodstandards.govt.nz for details. The Food Standards Code is available on the FSANZ website.

Principle 2 - Advertisements should not by implication, omission, ambiguity or exaggerated claim mislead or deceive or be likely to mislead or deceive consumers, abuse the trust of or exploit the lack of knowledge of consumers, exploit the superstitious or without justifiable reason play on fear.

Guidelines

2(a) All nutrient, nutritional and health claims should be factual, not misleading, and able to be substantiated. Claims should comply with the Food Standards Code*.

2(b) Care should be taken to ensure advertisements do not mislead as to the nutritive value of any food. Foods high in sugar, fat and / or salt should not be portrayed in any way that suggests they are beneficial to health.

2(c) Food advertisements containing obvious hyperbole, identifiable as such by the intended audience are not considered misleading.

2(d) Claims in an advertisement should not be inconsistent with information on the label or packaging of the food.

2(e) Advertisements should not claim or imply endorsement by any government agency, professional body or independent agency unless there is prior consent, the claim and the endorsement are verifiable, current and the agency or body named. An endorser represented as an expert should have qualifications appropriate to the expertise depicted.

2(f) Care should be taken with advertisements promoting a competition, premium or loyalty/continuity programme to ensure that advertisements do not encourage excessive repeat purchases of foods high in fat, salt and sugar.

2(g) Advertisements for foods high in sugar should not claim to be “low fat” or “fat free” which could mislead the consumer to believe the food is low in energy or beneficial to health.

2(h) Advertisements for food high in fat should not claim to be “low in sugar” or “sugar-free” which could mislead the consumer to believe the food is low in energy or beneficial to health.

***Note:** The regulation of nutrition, health and related claims is currently under review. Please refer to the Food Standards Australia New Zealand (FSANZ) website www.foodstandards.govt.nz for details. The Food Standards Code is available on the FSANZ website.

Bibliography

A Cases

1 New Zealand

Director-General of Health v Rothmans of Pall Mall (New Zealand) Ltd [1996] DCR 353.

Electoral Commission v Cameron 2 NZLR 421.

Hansen v R [2007] NZSC 7.

Hosking v Runting [2005] 1 NZLR 1.

Ransfield v The Radio Network [2005] 1 NZLR 233.

2 Canada

The Attorney General of Quebec v Irwin Toy Limited [1989] 1 SCR 927.

R v Oakes [1986] 1 SCR 103.

RJR MacDonald v Canada [1995] 3 SCR 199.

B Legislation

1 New Zealand

Broadcasting Standards Act 1989.

New Zealand Bill of Rights Act 1990.

Sale of Liquor Act 1989.

Smoke-free Environments Act 1990.

Australia New Zealand Food Standards Code.

Broadcasting Standards Authority Free-To-Air Television Code of Broadcasting Practice 2011.

Land Transport (Road User) Rule 2004

Public Health Bill 2007 (177-2).

2 Canada

Consumer Protection Act RSQ c P-40.1 1978.

Regulation Respecting the Application of the Consumer Protection Act 1981.

3 Australia

Protecting Children from Junk Food Advertising (Broadcasting and Telecommunications Amendment) Bill 2011 (Cth).

C New Zealand Advertising Standards Authority Complaints

Apples 13/485 ASCB Chairperson, 14 October 2013.

Bluebird Chippies “Rugby Superstars” Promotion 08/241 ASCB, 10 June 2008.

Burger King Bourbon Whopper 11/161 ASCB, 10 May 2011.

Carl’s Jr Jim Beam Bourbon Burger Facebook Website 13/368 ASCB, 10 September 2013.

Carls Jr Jim Beam Bourbon Burger Infonews and Youtube Website 13/369 ASCB, 10 September 2013.

Cheerios Breakfast Cereal 14/253 ASCB, 10 June 2014.

Energy Drink Poster 10/284 Appeal 10/025 ASCAB, 21 September 2010.

Energy Drink Poster 10/284 ASCB, 10 August 2010.

Hell Pizza Lamb Shanks 11/269 ASCB Chairperson, 24 May 2011.

KFC Snack Boxes 13/303 ASCB, 10 September 2013.

McDonald’s Family Game Night ASCB Chairperson, 19 June 2014.

McDonald’s Lamb Burger 12/442 ASCB Chairperson, 27 September 2012.

Pork Meat 13/243 ASCB, 14 June 2013.

School Canteen Poster 10/704 ASCB, 1 March 2010.

Yoghurt Ice Cream 09/757 Appeal 10/015 ASCAB, 2 June 2010.

Yoghurt Ice Cream 09/757 ASCB, 27 January 2010

D Parliamentary and Government Materials

1 New Zealand

(a) Debates

(1 July 1993) 536 NZPD 16538.

(11 December 2007) 644 NZPD 13841.

(b) Other

Attorney-General of New Zealand *Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the Liquor Advertising (Television and Radio) Bill* (2009).

Broadcasting Standards Authority *Seen and Heard: Children's Media Use, Exposure and Response* (Broadcasting Standards Authority, Wellington, 2008).

Food Standards Australia New Zealand "Short guide for industry to the Nutrient Profiling Scoring Criterion (NPSC) in Standard 1.2.7 - Nutrition, Health and Related Claims" (April 2013) Food Standards Australia New Zealand <www.foodstandards.gov.au>.

Law Commission *Chapter 19: Advertising, sponsorship and promotion of alcohol, in Alcohol in our lives: Curbing the harm* (NZLC R114, 2010).

Ministry of Health "Obesity data and stats" (9 July 2014) Ministry of Health <www.health.govt.nz>.

Ministry of Health "Obesity questions and answers" (13 January 2014) Ministry of Health <www.health.govt.nz>.

Ministry Of Health *Food and Beverage Classification System for Years 1-13: User Guide* (Learning Media Limited, Wellington, 2007).

Ministry of Health *Food and nutrition guidelines for healthy children aged 2-12 years* (Ministry of Health, Wellington, 1997).

Ministry of Health *Food and Nutrition Guidelines for Healthy Children and Young People (aged 2-18 years)* (Ministry of Health, Wellington, 2012).

Ministry of Health *The health of New Zealand children 2011: key findings of the New Zealand health survey*. (Ministry of Health, Wellington, N.Z., 2012).

Ministry of Justice "PART I: An Introduction to the Bill of Rights Act" (November 2004) Ministry of Justice <www.justice.govt.nz>.

Ministry of Justice "United Nations Convention on the Rights of the Child" (2014) Ministry of Justice <www.justice.govt.nz>.

New Zealand Customs Service "New excise duties rates for tobacco and tobacco products from 1 January 2014" (22 November 2013) New Zealand Customs Service <www.customs.govt.nz>.

Office of the Auditor-General New Zealand “Evolving approach to child obesity Part 2: Summary of research into community perspectives” (June 2013) Office of the Auditor-General New Zealand <www.oag.govt.nz>.

2 Quebec, Canada

Quebec 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” (10 September 2012) Quebec Office De La Protection Du Consommateur <www.opc.gouv.qc.ca>.

E Texts and Chapters in Texts

Simon P Anderson “Regulation of television advertising” in Paul Seabright (ed) *The Economic Regulation of Broadcasting Markets* (Cambridge University Press, Cambridge, 2007) 189.

AMD Silva-Sanigorski, and C Economos “Evidence of multi-setting approaches for obesity prevention: translation to best practice” in E Waters, B Swinburn, J Seidell, R Uauy (eds) *Preventing Childhood Obesity: Evidence Policy and Practice* (Blackwell Publishing Ltd, Oxford, 2010).

Andrew S Butler *The New Zealand Bill of Rights Act : a commentary* (LexisNexis NZ, Wellington, N.Z., 2005).

Corinna Hawkes *Marketing Food to Children: the Global Regulatory Environment* (World Health Organisation, Switzerland, 2004).

JS Mill *On Liberty*, David Spitz (ed) (W.W. Norton & Company Inc., New York, 1975).

SMB Morton and others *Growing Up in New Zealand: A longitudinal study of New Zealand children and their families. Now we are Two: Describing our first 1000 days.* (Growing Up in New Zealand, Auckland, 2014).

Oxford English Dictionary *nanny*, *n.1 and adj.* (3rd online ed, 2013).

B Swinburn, CH Dominick and S Vandevijvere *Benchmarking Food Environments: Experts’ Assessments of Policy Gaps and Priorities for the New Zealand Government* (University of Auckland, Auckland, 2014).

World Health Organization *Set of recommendations on the marketing of foods and non-alcoholic beverages to children* (World Health Organization, Geneva, Switzerland, 2010).

F Journal Articles

- Paul Anand and Alastair Gray “Obesity as Market Failure: Could a ‘Deliberative Economy’ Overcome the Problems of Paternalism?” (2009) 62 *Kyklos* 182.
- H Brinsden and T Lobstein “Comparison of nutrient profiling schemes for restricting the marketing of food and drink to children” (2013) 8 *Pediatric Obesity* 325.
- Kelly D Brownell, Rogan Kersh, David S Ludwig, Robert C Post, Rebecca M Puhl, Marlene B Schwartz and Walter C Willett “Personal Responsibility And Obesity: A Constructive Approach To A Controversial Issue” (2010) 29 *Health Aff* 379.
- Georgina Cairns, Kathryn Angus, Gerard Hastings and Martin Caraher “Systematic reviews of the evidence on the nature, extent and effects of food marketing to children. A retrospective summary” (2013) 62 *Appetite* 209.
- Pierre Chandon and Brian Wansink “Does food marketing need to make us fat? A review and solutions” (2012) 70 *Nutr Rev* 571.
- Simon Chapman “The ethics of tobacco advertising and advertising bans” (1996) 52 *Br Med Bull* 121.
- Anandita Devi, Helen Eyles, Mike Rayner, Cliona Ni Mhurchu, Boyd Swinburn, Emily Lonsdale-Cooper and Stefanie Vandevijvere “Nutritional quality, labelling and promotion of breakfast cereals on the New Zealand market” (2014) 81 *Appetite* 253.
- Tirtha Dhar and Kathy Baylis “Fast-food consumption and the ban on advertising targeting children: the Quebec experience” (2011) 48 *J Marketing Res* 799.
- Helen Dixon, Maree Scully, Melanie Wakefield, Bridget Kelly, Kathy Chapman and Robert Donovan “Parent’s responses to nutrient claims and sports celebrity endorsements on energy-dense and nutrient-poor foods: an experimental study” (2011) 14 *Public Health Nutr* 1071.
- Helen Dixon, Maree Scully, Bridget Kelly, Robert Donovan, Kathy Chapman and Melanie Wakefield “Counter-Advertising May Reduce Parent’s Susceptibility to Front-of-Package Promotions on Unhealthy Foods” (2014) [In Press] *J Nutr Educ Behav* 1.
- Lynne Eagle, Sandy Bulmer, Anne de Bruin and Philip J Kitchen “Advertising and Children” (2005) 11 *Journal of Promotion Management* 175.
- Lynne Eagle, Philip J Kitchen and Lawrence Rose “Defending brand advertising’s share of voice: A mature market(s) perspective” (2005) 13 *Journal of Brand Management* 65.
- Andrew SC Ehrenberg “Repetitive Advertising and the Consumer” (2000) 40 *J Advertising Res* 39.
- S Galbraith-Emami and T Lobstein “The impact of initiatives to limit the advertising of food and beverage products to children: a systematic review” (2013) 14 *Obes Rev* 960.
- Janette Greenhalgh, Alan J Dowey, Pauline J Horne, Fergus C Lowe, John H Griffiths and Chris J Whitaker “Positive and negative peer modelling effects on young children’s consumption of novel blue foods” (2009) 52 *Appetite* 646.

- Elizabeth Handsley, Kaye Mehta, John Coveney and Christopher Nehmy “Regulatory axes on food advertising to children on television” (2009) 6 Aust N Z Health Policy 1.
- Elizabeth Handsley, Christopher Nehmy, Kaye Mehta, John Coveney “A Children’s Rights Perspective on Food Advertising to Children” (2014) 22 Int’l J Child Rts 93.
- Debra Harker, Glen Wiggs and Michael Harker “Responsive advertising regulation: A case study from New Zealand” (2005) 40 Aust J Polit Sci 541.
- Debra Harker and Glenn Wiggs “Three Generations of Advertising Self-Regulation: Learning from our Forefathers” (2000) 11 Marketing Bulletin 1.
- Jennifer L Harris, John A Bargh and Kelly D Brownell “Priming Effects of Television Food Advertising on Eating Behavior” (2009) 28 Health Psychol 404.
- Jennifer L Harris and Samantha K Graff “Protecting Young People From Junk Food Advertising: Implications of Psychological Research for First Amendment Law” (2012) 102 Am J Public Health 214.
- Janet Hoek “Marketing communications and obesity: a view from the dark side” (2005) 118 N Z Med J U1608.
- Janet Hoek and Ninya Maubach “Self-Regulation, Marketing Communications and Childhood Obesity: A Critical Review from New Zealand” (2006) 39 Loy LA L Rev 139.
- S Holm “Obesity interventions and ethics” (2007) 8 Obesity Reviews 207.
- Bill Jeffery “The Supreme Court of Canada’s Appraisal of the 1980 Ban on Advertising to Children in Quebec: Implications for ‘Misleading’ Advertising Elsewhere” (2006) 39 Loy LA L Rev 237.
- G Jenkin, N Madhvani, L Signal and S Bowers “A systematic review of persuasive marketing techniques to promote food to children on television” (2014) 15 Obes Rev 281.
- Monique Potvin Kent, Lise Dubois and Alissa Wanless “Food marketing on children’s television in two different policy environments” (2011) 6 Pediatr Obes e433.
- Anita Lal, Marj Moodie, Toni Ashton, Mohammad Siahpush and Boyd Swinburn “Health care and lost productivity costs of overweight and obesity in New Zealand” (2012) 36 Aust N Z J Publ Heal 550.
- Sonia Livingstone “Assessing the research base for the policy debate over the effects of food advertising to children” (2005) 24 Int J Advert 273.
- Sonia Livingstone and Ellen J Helsper “Does Advertising Literacy Mediate the Effects of Advertising on Children? A Critical Examination of Two Linked Research Literatures in Relation to Obesity and Food Choice” (2006) 56 J Commun 560.
- Daniel Hays Lowenstein “Too Much Puff: Persuasion, Paternalism, and Commercial Speech” (1987) 56 U Cin L Rev 1205.

Elizabeth L McNaughton and Christopher M Goodridge “Canadian Approach to Freedom of Expression and the Regulation of Food and Drug Advertising, The” (2003) 58 Food & Drug LJ 521.

Michael S Merry “Paternalism, Obesity, and Tolerable Levels of Risk” (2012) 20 Democracy & Education 1.

Colin Mitchell “A legal analysis of advertising of unhealthy foods to children: a case for regulatory reform?” (2013) 382, Supplement 3 The Lancet S5.

Selene Mize “The Word Dog Never Bit Anyone: The Tobacco Advertising Ban and Freedom of Expression” (1993) 8 Otago L Rev 425.

Rob Moodie, Boyd Swinburn, Jeff Richardson and Bertino Somaini “Childhood obesity – a sign of commercial success, but a market failure” (2006) 1 *Pediatr Obes* 133.

Elizabeth No, B Kelly, A Devi, B Swinburn and Stefanie Vandevijvere “Food references and marketing in popular magazines for children and adolescents in New Zealand. A content analysis” (2014) 83 *Appetite* 75.

Simone Pettigrew, Liudmila Tarabashkina, Michele Roberts, Pascale Quester, Kathy Chapman and Caroline Miller “The effects of television and Internet food advertising on parents and children” (2013) 16 *Public Health Nutr* 2205.

Kim D Raine, Tim Lobstein, Jane Landon, Monique Potvin Kent, Suzie Pellerin, Timothy Caulfield, Diane Finegood, Lyne Mongeau, Neil Neary and John C Spence “Restricting marketing to children: Consensus on policy interventions to address obesity” (2013) 34 *J Public Health Pol* 239.

Mike Rayner, Peter Scarborough and Asha Kaur “Nutrient profiling and the regulation of marketing to children. Possibilities and pitfalls” (2013) 62 *Appetite* 232.

Gary Sacks, Boyd A Swinburn and Mark A Lawrence “A systematic policy approach to changing the food system and physical activity environments to prevent obesity” (2008) 5 *Aust N Z Health Policy* 13.

P Scarborough, C Payne, CG Agu, A Kaur, A Mizdrak, M Rayner, JCG Halford and E Boyland “How important is the choice of the nutrient profile model used to regulate broadcast advertising of foods to children? A comparison using a targeted data set” (2013) 67 *Eur J Clin Nutr* 815.

MB Schwartz and R Puhl “Childhood obesity: a societal problem to solve” (2003) 4 *Obes Rev* 57.

Maree Scully, Melanie Wakefield, Philippa Niven, Kathy Chapman, David Crawford, Iain S Pratt, Louise A Baur, Victoria Flood and Belinda Morley “Association between food marketing exposure and adolescents’ food choices and eating behaviors” (2012) 58 *Appetite* 1.

Caroline Shaw “(Non)regulation of marketing of unhealthy food to children in New Zealand” (2009) 122 *N Z Med J* 1288.

Fernando D Simoes “Paternalism and Health Law: Legal Promotion of a Healthy Lifestyle” [2013] *Eur J Risk Reg* 347.

Moiria Smith, Gabrielle Jenkin, Louise Signal and Rachael McLean “Consuming calories and creating cavities: beverages NZ children associate with sport” (2014) 81 *Appetite* 209.

Cass R Sunstein and Richard H Thaler “Libertarian Paternalism Is Not an Oxymoron” (2003) 70 *U Chi L Rev* 1159.

B Swinburn and G Egger “Preventive strategies against weight gain and obesity” (2002) 3 *Obes Rev* 289.

B Swinburn, T Gill and S Kumanyika “Obesity prevention: a proposed framework for translating evidence into action” (2005) 6 *Obes Rev* 23.

Boyd A Swinburn “Obesity prevention: the role of policies, laws and regulations” (2008) 5 *Australia and New Zealand Health Policy* 12.

Boyd A Swinburn, Gary Sacks, Kevin D Hall, Klim McPherson, Diane T Finegood, Marjory L Moodie and Steven L Gortmaker “The global obesity pandemic: shaped by global drivers and local environments” (2011) 378 *The Lancet* 804.

Louise Thornley, Louise Signal and George Thomson “Does industry regulation of food advertising protect child rights?” (2010) 20 *Crit Public Health* 25.

Nick Wilson, Louise Signal, Sarah Nicholls and George Thomson “Marketing fat and sugar to children on New Zealand television” (2006) 42 *Prev Med* 96.

Dan Winfield “Food Fight” [2010] *NZ Marketing Magazine* 76.

David G Yosifon “Resisting Deep Capture: The Commercial Speech Doctrine and Junk-Food Advertising to Children” (2006) 39 *Loy LA L Rev* 507.

Todd J Zywicki, Debra Holt and Marueen K Ohlhausen “Obesity and Advertising Policy” (2003) 12 *Geo Mason L Rev* 979.

G Internet Sources

Boston Medical Centre “Tools for Ideal Weight Control: Nutrition & Weight Management” (2014) Boston Medical Centre <www.bmc.org>.

Bowers, Sharron, Signal, Louise and Jenkin, Gabrielle “Does Current Industry Self-Regulation Of Food Marketing In New Zealand Protect Children From Exposure To Unhealthy Food Advertising? Report Prepared For The Cancer Society Of New Zealand By The Health Promotion And Policy Research Unit, University Of Otago, Wellington.” (2012) <www.otago.ac.nz>.

Commercial Approvals Bureau “Advertising Food and Beverage Products to Children” (2011) Commercial Approvals Bureau <www.commercialapprovals.co.nz>.

Commercial Approvals Bureau “Classification System” (2011) Commercial Approvals Bureau <www.commercialapprovals.co.nz>.

Dworkin, Gerald “Paternalism” (2014) The Stanford Encyclopedia of Philosophy <<http://plato.stanford.edu>>.

FOE: Fight the Obesity Epidemic “TV advertising” (9 April 2011) FOE: Fight the Obesity Epidemic <www.foe.org.nz>.

Claire Hofer “Review of Food Advertisements for Compliance with the Advertising Standards Authority’s Children’s Code for Advertising Food” (December 2012) Food Industry Group <www.fig.org.nz>.

McDonald’s “Happy Meal” (2014) Happy Meal <<http://www.happymeal.co.nz>>.

McDonald’s “Happy Meal” (2014) Happy Meal <<http://www.happymeal.com>>.

New Zealand Advertising Standards Authority “Code for Advertising to Children (2006)” (April 2006) New Zealand Advertising Standards Authority <www.asa.co.nz>.

New Zealand Advertising Standards Authority “Bugger...it’s ok! The case for advertising self-regulation” (2008) Advertising Standards Authority <www.asa.co.nz>.

New Zealand Advertising Standards Authority “Code for Advertising of Food” (2010) Advertising Standards Authority <www.asa.co.nz>.

New Zealand Advertising Standards Authority “Children’s Code For Advertising Food 2010” (2010) New Zealand Advertising Standards Authority <www.asa.co.nz>.

New Zealand Advertising Standards Authority “Final Report on the Review of the Code for Advertising to Children and the Code for Advertising of Food” (March 2010) New Zealand Advertising Standards Authority <www.asa.co.nz>.

New Zealand Advertising Standards Authority “ASA Guidance Note on Social Media” (October 2012) Advertising Standards Authority <www.asa.co.nz>.

New Zealand Advertising Standards Authority “Home” (2014) Advertising Standards Authority <<http://www.asa.co.nz/>>.

New Zealand Advertising Standards Authority “Interpretation” (2014) Advertising Standards Authority <www.asa.co.nz>.

New Zealand Advertising Standards Authority “Advertising Standards Complaints Appeals Board” (2014) Advertising Standards Authority <www.asa.co.nz>.

New Zealand Advertising Standards Authority “Advertising Standards Authority Inc.” (2014) Advertising Standards Authority <www.asa.co.nz>.

New Zealand Advertising Standards Authority “Search by Code” (2014) New Zealand Advertising Standards Authority <www.asa.co.nz>.

New Zealand Commercial Approvals Bureau “The CAB Story” (2011) Commercial Approvals <www.commercialapprovals.co.nz>

OECD Directorate for Employment, Labour and Social Affairs “Obesity Update” (June 2014) OECD <www.oecd.org>.

Phoenix Research “Survey of Public Opinions About Advertising Food to Children: Understanding Attitudes in New Zealand. Research Report for Peak Group.” (November 2007) Cancer Society of New Zealand <www.cancernz.org.nz>.

Pizza Hut NZ “Pizza Hut NZ Facebook Page” (September 2014) Facebook <www.facebook.com/pizzahutnz>.

Price Waterhouse Coopers New Zealand “New Zealand online space: Show me the money” (5 June 2013) Price Waterhouse Coopers <www.pwc.co.nz>.

Roy Morgan Research “Digital vs traditional media in New Zealand” (20 September 2013) Roy Morgan Research <www.roymorgan.com>.

ThinkTV “The Children’s Television Policies: Advertising in Pre-School and School-Age Children’s Programming Times” (2011) ThinkTV <www.thinktv.co.nz>.

ThinkTV “ThinkTV” (2011) ThinkTV <www.thinktv.co.nz>.

ThinkTV “Advertising On Television: Getting it right for children” (2011) ThinkTV <www.thinktv.co.nz>.

ThinkTV “Television and online social media” (2011) ThinkTV <www.thinktv.co.nz>.

World Health Organisation “Controlling the global obesity epidemic” (2014) World Health Organisation <www.who.int>

World Health Organisation “Obesity and overweight: Fact sheet 311” (August 2014) World Health Organisation <www.who.int>.

H Correspondence

Email from (Letter from Janice L. Marturano (Vice President - Public Responsibility and Deputy General Counsel of General Mills) to Donald Clark (Secretary of the Federal Trade Commission)) “regarding Interagency Working Group on Food Marketed to Children: FTC Project No. P094513 Comments on Proposed Nutrition Principles and General Comments and Proposed Marketing Definitions” (14 July 2011).

I Newspaper Articles

Isaac Davison “Poll finds majority support for ‘fat tax’” *New Zealand Herald* (online ed, Auckland, 24 July 2014).

Editorial “Junk food advert ban no answer” *The Press* (online ed, Christchurch, 11 February 2014).

David Fisher “Move to ban fast-food advertising on city streets” *New Zealand Herald* (online ed, Auckland, 6 August 2012).

Corinna Hawkes *Defining “Healthy” and “Unhealthy” Foods: An International Review* (2009).

James Ihaka “Sports drinks: Should kids be using them?” *New Zealand Herald* (online ed, Auckland, 9 August 2014).

Gabrielle Jenkin “Food Marketing to NZ kids” (Big Food Symposium, University of Otago, Wellington, February 2014).

ONE News “Plain packaging for fizzy drinks ‘in the next 10 years’” *TVNZ* (online ed, Auckland, 30 May 2014)

Jeff Ritterman “Let’s Ban Food and Beverage Ads! We Can Eat When We Are Hungry and Drink When We Are Thirsty Like Nature Intended” *Huffington Post* (online ed, New York, 20 May 2014).

Rebecca Smith “Ministers fail to ban junk food advertising before watershed despite childhood obesity problem” *The Telegraph* (online ed, London, 27 April 2014).

J Unpublished Dissertations

Samuel Buchan “Censoring God: The Scope and Limits of Religious Advertising in New Zealand” (LLB (Hons) Dissertation, University of Otago, 2012).

Sarah Barker “The Obesity Epidemic: Towards a Regulatory Framework to Combat Obesity in New Zealand” (LLM Dissertation, Victoria University Wellington, 2011).