

In the matter of:
Complaint 08/208; NZ Dental Association re Fluoride Action Network NZ Inc

NOTICE OF PROTEST TO COMPETENT JURISDICTION

Address for correspondence:
FLUORIDE ACTION NETWORK (NZ) INC
c/- Mark Atkin
5 Tarras Gr
Lower Hutt

Fluoride Action Network NZ Inc. (FANNZ) hereby challenges the competent jurisdiction of the Advertising Standards Complaints Board in this matter.

GROUND S

- 1) FANNZ has previously requested that the ASCB identify the standard of evidence by which it identifies proof of a fact as opposed to a statement of opinion. This was requested in light of the ASCB's failure to understand or meet its responsibilities under *Cameron*¹ in relation to our complaints 05/237, 05/251, 05/255, 05/253, 05/252 against advertisements by the West Coast District Health Board in 2005 (see attached as Appendix 1). The Appeal Board also failed to address the grounds of appeal on one complaint. We are confident that if the matter were taken to judicial review the court would find in our favour. The ASCB has consistently refused to provide this information. We are forced to conclude that if the ASCB does not know where to draw this line it cannot be competent to adjudicate the matter. If the ASCB knows, but is refusing to state the evidentiary requirements, this is not only in breach of natural justice, but renders it impossible for FANNZ to know what level of evidence to supply the ASCB in response to the complaint. It also follows that any adjudication lacks adequate transparency.
- 2) By refusing to exercise its functions in relation to advertising by DHBs, the ASCB has created its own conflict of interest in relation to this complaint. This is because, if the ASCB did not uphold the current complaint and a DHB subsequently placed an advertisement making the exact opposing statements to ours, that advertisement would necessarily be in breach of the Code; yet if we complained about it, the ASCB would bind itself, by its own policy, to allow it. This therefore creates a pressure for the ASCB to reach a judgment that avoids its self-created conflict of interest (i.e. to uphold the complaint regardless of its merits), negating the ASCB's required objectivity.

Accordingly, we protest the competent jurisdiction of the ASCB on matters relating to fluoridation, and are therefore, under the rules of protest to jurisdiction, unable to forward the proof we have assembled that our statements are true until the ASCB can

- 1) provide the information on standard of evidence that we have previously requested; and
- 2) resolve to our satisfaction, and publicly state, a position in relation to complaints against DHBs for breaches of the Advertising Standards in relation to fluoridation that is consistent with *Cameron*.

¹ Electoral Commission v Cameron [1997] 2 NZLR 260

Obviously we will not acknowledge as binding upon us any decision by the ASCB on this matter until:

- 1) competent jurisdiction has been established as above; and
- 2) we have subsequently had time to respond.

The pamphlet was produced for Fluoride Action Network Dunedin, headed by Olive McRae, a FANNZ committee member. No other party was involved in the design of the pamphlet. FAN Dunedin advises that no other party was involved in the distribution of the pamphlet.

This response is on behalf of both FAN Dunedin and FANNZ.

G Mark Atkin LLB(Hons)
National Co-ordinator
Fluoride Action Network NZ Inc.
6 July 2008.

Appendix 1

FLUORIDE ACTION NETWORK (NZ) INC
c/- Mark Atkin
5 Tarras Gr
Lower Hutt

24 September 2006.

Heather McKenzie
Deputy Secretary
ASCAB

Dear Ms McKenzie

Thank you for your letter of 12 September. I acknowledge that the only path from the ASCAB's decision is judicial review.

Regarding the second point in your letter, the questions I asked both the appeal board and the ASCB itself were with regard to the ASCB's exercise of its regulatory function, specifically, in the terms of *Cameron*, at what level of proof the ASCB is exercising its proper role in finding an advertisement is, as a matter of fact, relaying false information and therefore in breach of the Code, as opposed to the ASCB simply imposing its opinion. The DHB, as a body subject to the ASCB's jurisdiction as found in *Cameron*, is clearly not an appropriate body to make this decision on the proper functioning of the ASCB. The position stated in your letter, in effect, makes the DHB a judge in its own cause.

Accordingly, please forward the information requested, that is, at what level of evidence the ASCB considers itself, or the ASCAB considers the ASCB to be, exercising its proper function of finding on the facts as shown by that evidence, rather than "substituting its own opinion" for that of the DHB. To put it another way, what level of evidence constitutes adequate proof of fact rather than simply an opposing opinion. Please respond in respect of the examples previously given.

Failure to do this would establish that the ASCB has not come to terms with the decision in *Cameron* and does not adequately understand how to exercise its jurisdiction when dealing with "expert bodies". We would consider this an extremely serious issue when the ASCB is again required to rule on misleading or factually incorrect DHB advertising.

I look forward to your comprehensive response.